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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 538 F.2d 956. The opinion of the district court (App. E, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on July 13, 1976. A petition for

rehearing with suggestion for rehearing *en banc* was denied on October 26, 1976 (Apps. C and D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a United States District Court, as part of an admittedly valid order authorizing the use of a pen register to investigate gambling offenses being committed by means of the telephone, may properly direct the telephone company to provide federal law enforcement agents the facilities and technical assistance necessary for implementation of the court's order, in the absence of legislation expressly authorizing such an order.

STATUTE AND RULE INVOLVED

The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

STATEMENT

1. On March 19, 1976, upon application of the government, Judge Charles H. Tenney of the United States District Court for the Southern District of New York issued an order (C.A. App. 1-3) authorizing FBI agents to install a pen register[1] upon specified telephones, based on his finding that there was probable cause to believe that the telephones were being used in the commission of federal gambling offenses, in violation of 18 U.S.C. 371 and 1952. The order authorized use of a pen register until the telephone numbers of outgoing calls dialed from the subject telephones led to the identification of confederates of the suspects or until twenty days had elapsed from the date of the order, whichever occurred first (C.A. App. 2-3).[2] As part of the order, Judge Tenney directed that respondent telephone company "shall furnish the applicant forthwith all

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[1] "A pen register is a mechanical instrument attached to a telephone line * * * which records the outgoing numbers dialed on a particular telephone * * * The device is not used to learn or monitor the contents of a call nor does it record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated" (App. A, *infra*, pp. 1a-2a). See *United States* v. *Focarile*, 340 F. Supp. 1033, 1039-1040 (D. Md.), affirmed *sub nom. United States* v. *Giordano*, 469 F.2d 522 (C.A. 4), affirmed, 416 U.S. 505; *United States* v. *Caplan*, 255 F. Supp. 805, 807 (E.D. Mich.).

[2] After twenty days had passed and the pen register had still not been installed, the order was extended for another twenty days (C.A. App. 115).

information, facilities and technical assistance necessary to accomplish the interception unobtrusively," with compensation to be paid the company at the prevailing rates (C.A. App. 2).

After being informed of the pen register order, the telephone company provided the FBI with sufficient information to allow FBI agents to install and monitor a pen register located in the vicinity of the apartment containing the subject telephones [3] but refused to lease to the FBI a telephone line to which the pen register could be connected and monitored from a remote location (C.A. App. 8, 23-24).[4] In order to determine whether the investigation could be conducted unobtrusively without a leased line, FBI agents canvassed the neighborhood for three days in an attempt to find a location for the pen register from which FBI telephone lines could be strung to the terminal box without compromising the investigation. However, because of the location of

[3] This information included the location of the terminal boxes where the apartment telephone wires emerge from sealed telephone cables ("make an appearance") and identification of the specific terminals to which the wires leading to the subject telephones are connected (C.A. App. 16-17). See generally, Dash, Schwartz, Knowlton, *The Eavesdroppers*, 310-312 (1959).

[4] A "leased line" is an unused telephone line that makes an appearance in the same terminal box as the telephone lines of the suspects. Inside the box, the leased line can be connected to the subject line, and the pen register can then be installed upon the leased line at a remote location and monitored at that point (see C.A. App. 16-17).

the apartment and because the suspects were known to use counter-surveillance techniques, it was determined that the use of a leased line was essential (C.A. App. 24). Despite this, the telephone company refused to comply with the pen register order and provide the FBI with a leased line (C.A. App. 24-25).

2. The telephone company thereafter moved the district court to vacate that portion of the pen register order that directed it to furnish facilities and technical assistance to the FBI (C.A. App. 5-6). The district court denied the motion in an opinion issued on April 2, 1976. In its opinion, the district court first noted that the telephone company did not challenge the court's authority to authorize FBI agents to use a pen register (App. E, *infra*, p. 31a), but claimed only that because the order directed it to provide the FBI with cooperation that would give the FBI the capability to perform a full wire interception,[5] it could only be required to do so in an

[5] That assertion is not entirely correct. If the company provided a leased line to the FBI (or indeed, if it provided the minimal assistance originally offered here in a case where that would permit the FBI to install a pen register), the agents using the pen register would have the ability, if they chose to violate the court's order, to conduct a full wire interception, but only if they obtained additional equipment not required in a pen register investigation. Of course, an agent so violating the order would be in contempt of court, and any evidence obtained in that manner would presumably be inadmissible.

However, the telephone company could comply with the order and still reduce that risk to a minimum or even elimi-

order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510-2520) (App. E, *infra*, p. 35a). The district court rejected this argument, pointing out that Title III regulates wire interceptions and not pen registers (*id.* at 32a-36a). The court concluded by adopting the holding of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809, that a district court has inherent authority to compel the telephone company to provide facilities and technical assistance in connection with a pen register order (App. E, *infra*, pp. 37a-39a).[6]

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nate it totally by the type of facilities and technical assistance it provided. For example, the company could permit the pen register to be used by federal agents at the telephone company central exchange, where the opportunity to use unauthorized equipment would be extremely limited. Or the telephone company could attach a pen register to the subject telephone lines itself and then transmit the dial impulses over a leased line to the monitoring agents. In this situation an agent would not have the ability to monitor conversations even if he had the desire, because he would not have direct access to the telephone lines of the suspect.

[6] After the district court and the court of appeals refused the telephone company's motions to stay the pen register order pending appeal of the denial of the motion to vacate, the company on April 9, 1976 provided a leased line, allowing the use of the pen register from that date until April 28, 1976. Thus, the pen register investigation had been completed by the time of the court of appeals' decision in this case, and neither that decision nor a decision by this Court could affect this particular investigation. Nevertheless, as we demonstrate (*infra* pp. 17-20), this does not render the case moot because this is a classic example of a controversy which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515.

3. The court of appeals reversed, one judge dissenting (App. A, *infra*). The court began by noting that pen registers do not fall within the scope of Title III and are not otherwise prohibited or regulated by statute. The court agreed with the government that district courts have the power—either inherently or by analogy to Rule 41, Fed. R. Crim. P. —to authorize pen register surveillance, and it concluded that such power was properly exercised in this case (App. A, *infra*, pp. 3a-8a). However, the majority concluded that the district court abused its discretion in ordering respondent to assist in installing the pen register. It assumed *arguendo* "that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company," but it nevertheless held that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion" for the district court to order the company to provide facilities or assistance (*id.* at 13a). In reaching this conclusion, the majority recognized that (*id.* at 13a-14a):

> Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested requires no extraordinary expenditure of time or effort by [respondent]; indeed, as we understand it, providing lease or private line is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or crimi-

> nal liability; and the order itself provides for financial compensation for [respondent] for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered.

Despite these strong justifications for the district court's order, the majority concluded that the issuance of "such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (*id.* at 15a). It believed that Congress was better equipped than the courts to decide the circumstances under which the telephone company should be required to render assistance and facilities necessary for implementation of a pen register order (*id.* at 15a-16a).

In dissent, Judge Mansfield agreed with the majority's assumption that the district court possessed the power to require respondent to assist in implementing the order, but he disagreed that such orders constitute an abuse of discretion in the absence of explicit statutory authorization. As he stated: "[S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint" (*id.* at 24a). He further observed that district

courts could be trusted to use their powers under the Act only in "cases of clear necessity" and that the instant case was one in which the telephone company's assistance was appropriately ordered under that standard (*id.* at 22a-23a).

REASONS FOR GRANTING THE WRIT

1. Although the decision below is phrased in terms of abuse of discretion by the trial court, the basis for that finding does not lie in any particular facts of this case—indeed, the opinion specifically recognizes that the facts here strongly support the exercise of discretion. Instead, the majority has in substance concluded that it will *always* be an abuse of judicial discretion to require the telephone company to assist in the installation of a pen register, so long as there is no statute expressly authorizing such an order. Therefore, the decision below conflicts with that of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809, sustaining the validity of such an order under similar circumstances.

It is important that this Court promptly resolve this conflict among the circuits regarding the powers of the district court to assure implementation of pen register orders, both because the issue is at the heart of an increasing volume of litigation in the lower federal courts [7] and because the issue has a substantial practical impact upon effective law enforcement.

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[7] Challenges to pen register cooperation orders are now pending in three circuits: *In re Application*, No. 76-4117 (C.A. 5); *In the Matter of the Application* (C.A. 6), appeal

Moreover, to the extent that respondent's refusal to cooperate is based on a fear that voluntary assistance may subject it to civil or criminal penalties (App. A, *infra*, p. 9a), the decision below indicates to telephone companies throughout the country that the state of the law is unsettled; this, in turn, appears to be having the effect of encouraging them to challenge orders to assist in the installation of pen registers. The delays caused by litigation of such orders has serious adverse impact on fast-moving criminal investigations; thus, the practical effect of the uncertainty concerning the district courts' power to compel the telephone company to assist in installing pen registers is substantially interfering with the use of this investigative tool.

Furthermore, to the extent that telephone companies are, as in this case, successful in resisting any obligation to cooperate (and unwilling to cooperate voluntarily), the result ordinarily will be to foreclose the possibility of utilizing pen registers to aid in the detection of criminal activity. The practical

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of Ohio Bell Telephone Company from No. USDJ 26, N.D. Ohio, not yet docketed; *United States* v. *Southwestern Bell Telephone Company*, No. 76-1725 (C.A. 8). See also *Application of United States*, 407 F. Supp. 398 (W.D. Mo.), which concluded that district courts have no authority to issue pen register orders except incident to Title III interceptions. A case presenting a related question, namely, whether the telephone company may be required to assist in installing a device to identify the source of incoming calls in connection with a Title III wire interception, is pending in the Sixth Circuit. *Michigan Bell Telephone Company* v. *United States*, Nos. 76-2202, 76-2203.

consequence of this in many cases where there is reason to believe the telephone is being used to further unlawful activities is to impel law enforcement authorities toward utilization of wiretaps even though use of a pen register might suffice, simply because the telephone company can be judicially compelled to render assistance in installing a wiretap (18 U.S.C. 2518(4)). In terms of striking a sound balance between law enforcement needs and personal privacy interests, it seems to us plainly undesirable to deprive the government of the less intrusive investigative method of the pen register (which does not reveal the contents of conversations), as the court of appeals has done in this case.[8] The increased use of wiretaps is also undesirable insofar as it imposes added procedural burdens on the government and the courts in complying with the complex requirements of Title III.

The court of appeals implicitly recognized these drawbacks to its decision in expressing the hope that

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[8] Pen registers are frequently used in investigations that may later lead to applications for wire interceptions. In those situations, the initial use of the pen register protects privacy by helping to verify the need for an interception before it is utilized, and thus avoiding unnecessary interceptions. In addition, a pen register may be used when all the government needs to know is the location of a suspect or a fugitive. For example, a pen register on the telephone of a relative of such a person, when the government has probable cause to believe the phone will be used to contact him, may lead to the location of the subject. A pen register on the telephone of a narcotics dealer will be useful in disclosing the locations of his customers and facilitating surveillance of illicit activities.

Congress would promptly consider the legislation the majority believed necessary (App. A, *infra*, p. 16a). But further legislation is not necessary—the decision below is simply incorrect. It is justified neither by congressional intent as expressed in the enactment and amendment of Title III, nor by the need to guard against the possibility that law enforcement authorities, with the aid of federal courts, will indiscriminately "impress unwilling aid on private third parties" (App. A, *infra*, p. 15a).

2. a. In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2510-2520). That legislation embodied the first statutory authorization for the use of electronic surveillance by law enforcement officers under court supervision and in accordance with exacting standards set forth in the Act. At the same time, by Section 803 of Title III (82 Stat. 223), Congress amended Section 605 of the Communications Act of 1934, 48 Stat. 1064, 1103, 47 U.S.C. 605. Both the majority and the dissenting judge below agreed that by this legislation Congress excluded pen registers from the scope of Title III and amended Section 605 so that it would no longer prohibit the use of pen registers, as the prior language of that statute had been held to do (App. A, *infra*, pp. 3a-8a, 17a). See 18 U.S.C. 2510(4); 47 U.S.C. 605; S. Rep. No. 1097, 90th Cong., 2d Sess. 90, 107-108 (1968). See also *United States* v. *Giordano*, 416 U.S. 505, 553-554 (Powell, J., concurring and dissenting); *United*

States v. *Illinois Bell Tel. Co.*, *supra*, 531 F.2d at 812, and cases cited therein.

It is also plain, as the majority below assumed and the dissent agreed, that the district court had jurisdiction to issue an order authorizing the use of pen registers in the instant investigation.[9] And to give effect to this power, the district court had the concomitant power under the All Writs Act, 28 U.S.C. 1651(a), to order the telephone company to provide facilities and assistance, which only it could supply and which were necessary to implement the court's order.

The purpose of the All Writs Act is "to supply the courts with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution * * *." *Harris* v. *Nelson*, 394 U.S. 286, 299-300. The duty to issue warrants when required by the Fourth Amendment, and where appropriate, resides in the judiciary, and the All Writs Act gives federal courts the power to make their lawfully issued warrants effective. *United States* v. *Illinois Bell*

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[9] The source of the district court's power to issue a pen register order has been found by the court below and the Seventh Circuit either in Rule 41, Fed. R. Crim. P., or in the court's inherent power. Rule 57(b), Fed. R. Crim. P., is presently the procedural means through which a district court's inherent power is exercised. The Rule provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Tel. Co., *supra*, 531 F.2d at 814.[10] The order in this case that the telephone company provide facilities and services (without which the pen register authorization would be meaningless) is, as Judge Mansfield noted (App. A, *infra*, p. 19a), not materially different from similar types of orders validly issued pursuant to the Act. See, *e.g.*, *Board of Education* v. *York*, 429 F.2d 66, 68-69 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *Field*, 193 F. 2d 92, 95-96 (C.A. 2), certiorari denied, 342 U.S. 894.

b. The majority's holding that federal courts should await congressional guidance before using their power to require telephone company assistance seriously underestimates the capability of the federal judiciary to exercise this power with restraint.[11] The

[10] *Application of the United States*, 427 F. 2d 639 (C.A. 9), does not hold to the contrary. The basis for the decision in that case that the district courts did not have the power to order telephone company assistance in wire interceptions was that Congress by Title III had completely pre-empted the field of wire interceptions, and that if it had desired the courts to have such power it would have granted it. The case is inapplicable here, because Congress explicitly declined to regulate pen registers in Title III; they are thus outside any pre-empted area. In any event, when Congress amended Title III in 1970 to provide the explicit authorization for orders requiring telephone company assistance in installing interceptions (84 Stat. 654), it made clear that there had been no intent to withhold such authority originally. See 115 Cong. Rec. 37192-37193 (1969). There is even less reason to infer such intent with regard to pen register orders.

[11] Congress has already indicated that it expects pen registers to be used (see *supra*, p. 12); their use is evidently one of the "normal investigative procedures" to be considered before application for interception orders (see 18 U.S.C. 2518 (1)(c) and (3)(c)). Since telephone company assistance is necessary for their installation, Congress could hardly have intended to give the telephone company an absolute veto over pen register use.

majority feared that approval of the court's exercise of discretion in ordering the clearly necessary and non-burdensome assistance at issue here might lead to situations in which the court would be unable "to protect [a] third party from excessive or overzealous Government activity or compulsion" (App. A, *infra*, p. 16a). But as the dissent points out (*id.* at 24a):

> [S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint.

This conclusion is strongly supported by the fact that when Congress found it necessary to provide explicit authority for orders requiring telephone company assistance in installing wiretaps, it did not limit that authorization by any such statutory blueprint to govern judicial discretion.

Similarly, the decisions of this Court suggest that no specific statutory authorization is necessary. In *Katz* v. *United States*, 389 U.S. 347, 354-355, the Court stated that the electronic surveillance in that case would have been constitutional had it been conducted pursuant to court order; there was no sugges-

tion that a statute was required before such an order could be issued. Cf. *United States* v. *United States District Court*, 407 U.S. 297, 306-308, 321-324.

c. Finally, we submit that the majority's concerns were based on a misunderstanding of the extent of the telephone company's duty to assist in criminal investigations. The executive branch of government has inherent power to require the assistance of citizens in carrying out its law enforcement duties.[12] As applied here, this assistance is particularly defined and imposes no significant burden on the company. Moreover, the telephone company is not a mere citizen corporation, but a common carrier charged with special obligations to the public. Cf. *Balinovic* v. *Evening Star Newspaper Co.*, 113 F. 2d 505, 506-507 (C.A.D.C.), certiorari denied, 311 U.S. 675. Con-

[12] A basic illustration of this inherent power is the *posse comitatus*, in which law enforcement officers may require the assistance of members of the public in carrying out their duties. See *In re Quarles and Butler*, 158 U.S. 532, 535. As Mr. Justice Cardozo, then sitting on the New York Court of Appeals, said (*Babington* v. *Yellow Taxi Corp.*, 250 N.Y. 14, 17, 164 N.E. 726, 727): "Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand." He later referred to this obligation as the "duty of the able-bodied citizen to aid in suppressing crime." *Hamilton* v. *Regents*, 293 U.S. 245, 265 fn. * (concurring). This duty is not limited to emergency situations or to hot pursuit arrests, but applies equally in the case of necessary assistance in executing search warrants, as Congress recognized in 18 U.S.C. 3105. See *Elrod* v. *Moss*, 278 Fed. 123, 129 (C.A. 4).

gress has required the telephone company to provide telephone services upon reasonable request, 47 U.S.C. 201, and it cannot be seriously contended that a request for assistance by the FBI in cases such as this is unreasonable. See also 47 U.S.C. 202, 605(6).

Indeed, the telephone company is under a particular obligation to aid the government here, because it is no mere bystander in relation to the crimes being investigated. On the contrary, it is providing telephone facilities to those whom a district court has determined are probably using them to commit federal crimes. In such circumstances, it is disingenuous for the telephone company to argue that any assistance to law enforcement officers creates "the danger of indiscriminate invasions of privacy" (App. A, *infra*, p. 15a).

3. In this case the telephone company complied with the pen register order of the district court after both lower courts had denied stays pending its appeal; accordingly, the pen registers were installed and the investigation completed some months prior to the decision of the court of appeals. Nevertheless, we submit that this case is not moot. Rather, this is a classic example of a controversy that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515; *Roe* v. *Wade*, 410 U.S. 113, 125; cf. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308-309. In *Weinstein* v. *Bradford*, 423 U.S. 147, 149, the Court reiterated that this doctrine "was limited to the situation where two

elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Both these elements are satisfied here.

Pen register orders authorize surveillance only for brief periods. As is typical, the order here was limited to a maximum of twenty days; it was then extended for twenty days after review in the district court. Despite expedited action by the court of appeals, the order and the investigation expired six days after oral argument. Moreover, even had the pen register order been stayed pending appeal, the mootness problem would not have been avoided. Full litigation includes the opportunity for effective appellate review, including review by this Court. *Roe* v. *Wade*, *supra*, 410 U.S. at 125. But before that review could be completed, the showing of probable cause upon which the order authorizing the installation of the pen register was based would have become stale. Thus, even with a stay, this Court would nevertheless be in the position of passing upon the validity of an order that could no longer be enforced if it were upheld.[13] In sum, the realities of the in-

[13] The Fifth Circuit ignored the time required for review by this Court when, in *Southern Bell Tel. & Tel. Co.* v. *United States*, 541 F.2d 1151, it dismissed as moot an appeal raising the issues involved here on the theory that a stay and an expedited appeal would permit appellate review of the district court's order before it became moot.

vestigation of crime preclude effective appellate review of orders like the one involved here, if the case becomes moot when the order expires, either because the telephone company has provided the assistance required or because the underlying order upon which the requirement rests has lapsed for staleness. The order here, like that in *Nebraska Press Ass'n* v. *Stuart*, No. 75-817, decided June 30, 1976, slip op. 6, is "by nature short-lived." Here, as there, the expiration of the particular order does not moot the case. Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319.[14]

Regarding the second element set forth in *Weinstein*, it is plain that this issue will be joined again between the telephone company and the government in the future if it is not resolved now.[15] Pen registers

[14] It is possible to conceive of situations in which the issue here could arise in a way in which the short life of the order would not preclude review—for example, if the telephone company were held in criminal contempt. But we believe that the "evading review" test is met when the order will not be reviewable in the normal course of events, and that the parties should not be denied review until the issue arises in some unusual posture that avoids the mootness problem (which, of course, may never actually happen).

[15] If the case is moot, it became so when the pen register was removed on April 28, 1976, before the court of appeals' judgment was entered on July 13, 1976, and that judgment should be vacated. If that were done, there would be no bar to the issuance of similar assistance orders by other district courts in the second circuit in the future. Alternatively, if the judgment below remains in effect and compels compliance by the district courts in the Second Circuit, the case is not moot because "incapable of repetition." See *Richardson* v. *Ramirez*, 418 U.S. 24, 35-36.

are useful investigative tools, which we intend to continue to seek to utilize in the future despite a consistent telephone company policy of refusing to render voluntary assistance in installing them. *Southern Bell Tel. & Tel. Co.* v. *United States*, *supra*, 541 F.2d at 1155-1156; see cases cited *supra*, n. 7.[16]

In sum, despite respondent's compliance with this particular order, this case presents a well-defined controversy between the parties on an important issue that is bound to arise between them in the future and to evade review before subsequent orders expire. See Note, *The Mootness Doctrine in The Supreme Court*, 88 Harv. L. Rev. 373 (1974). It is consequently not moot.

[16] There does not seem to be any possibility that the mootness problem could be avoided by a class action, as it was, for example, in *Sosna* v. *Iowa*, 419 U.S. 393, 399-403. The interests affected by the issue here, although important, involve only law enforcement officials and the telephone company; neither party could claim to represent a class.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1068, Docket 76-1155

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE

Argued April 22, 1976

Decided July 13, 1976

Before MEDINA, FEINBERG and MANSFIELD, Circuit Judges.

MEDINA, Circuit Judge:

This important and interesting case involves the Government's application for an order authorizing the installation and use of a pen register, and directing the New York Telephone Company to provide information, facilities and technical assistance to Special Agents of the Federal Bureau of Investigation in the installation and operation of the device. A pen register is a mechanical instrument attached to a telephone line, usually at a central telephone office, which records the outgoing numbers dialed on a particular telephone. In the case of a rotary dial phone, the pen register records on a paper tape dots or dashes equal in number to electrical pulses which correspond to the telephone number dialed. The de-

vice is not used to learn or monitor the contents of a call nor does it record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated. *See United States* v. *Caplan*, 255 F.Supp. 805, 807 (E.D.Mich. 1966). The device used for touch tone telephones, the TR-12 touch tone decoder, is very similar to a pen register, differing primarily in that it causes the digits dialed on the subject telephone to be printed in arabic numerals, rather than dots or dashes, corresponding to the electrical pulses. *See United States* v. *Focarile*, 340 F.Supp. 1033, 1039-1040 (D.Md. 1972), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

By an order dated March 19, 1976, Judge Charles H. Tenney of the United States District Court for the Southern District of New York directed the Telephone Company to furnish to government agents investigating an alleged illegal gambling operation "All information, facilities and technical assistance necessary to accomplish the interception [by pen register] unobstrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted * * *." Pursuant to this order, the Telephone Company agreed to provide information such as terminal locations and cable and pair identifications, but declined to furnish telephone lease or private lines, citing Telephone Company regulations which prohibited such assistance Government Special Agents determined that without these lease lines they could not successfully implement pen register surveillance; Telephone Company assistance in this regard was thus crucial. On March 30, 1976, appellant moved by order to show cause to vacate or modify that portion of Judge Tenney's March 19, 1976 order which mandated technical assistance by the Telephone Company in the installation of pen registers, contending that the order was without legal authority. In an opinion of April 2, 1976, not yet reported, Judge Tenney denied the motion in all respects. Appellant then promptly filed a notice of appeal and moved for a stay of both District Court orders pending appeal. This Court denied the motion for a stay on April 8, 1976, and ordered an expedited appeal.

We will consider separately the two questions raised on this appeal: first, whether the District Court erred in authorizing the use of a pen register; and second, whether it erred in ordering the appellant to provide technical assistance to the Government. As it appears that this is the first time these important issues have been reviewed by this Court, we believe they merit some extended discussion.

I

In 1968, the Congress enacted the Omnibus Crime Control and Safe Street Act, Title III of which added Sections 2510-2520 to Title 18 of the United

States Code and amended Section 605 of the Federal Communications Act of 1934, 47 U.S.C. Section 605. Title III is a comprehensive electronic surveillance statute, prohibiting all wiretapping and other types of electronic surveillance except by law enforcement officials investigating certain specified crimes. The statute requires compliance with strict procedures, all under judicial supervision. Both parties agree that pen register orders are not covered by Title III because its provisions apply only to surveillance which involves an "interception" of wire communication, or an "aural acquisition," as interception is defined in 18 U.S.C. Section 2510(4), and because the legislative history makes clear that there was no Congressional intent to subject pen registers to the prospective standards of Title III.[1]

> The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example would be permissible. [citation omitted]. The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication. S.Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968), U.S. Code Cong. & Admin. News 1968, pp. 2112, 2178.

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[1] *See also Blakey*, "A Proposed Electronic Surveillance Act," 43 Notre Dame L.Rev. 657 (1968). Professor Blakey, who has been credited with primary authorship of Title III, *see United States* v. *Giordano*, 416 U.S. 505, 517 n. 7, 526 n. 16, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), states that Title III was not intended to prevent the tracing of phone calls by the use of a pen register.

Other courts faced with the question of the applicability of Title III to pen register orders have likewise concluded that they are excluded. *See United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 408, 410, (N.D.Ill., 1976); *United States* v. *Giordano*, 416 U.S. 505, 553-54, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, *J.*, concurring in part and dissenting in part, joined by Burger, *C. J.*, Blackmun & Rehnquist, *JJ.*); *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339, 43 L.Ed.2d 432 (1975); *United States* v. *Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971).[2]

It is also clear that pen register orders are not now covered by Section 605 of the Federal Communications Act of 1934. Prior to the enactment of Title III, there was authority for the broad applicability of Section 605 to the interception and disclosure of "any communication," including pen registers. *See United States* v. *Dote*, 371 F.2d 176 (7th Cir. 1966); *United States* v. *Caplan*, 255 F.Supp. 805 (E.D. Mich. 1966). The amendment of Section 605 effected by Title III restricted the coverage of that Section to radio communications, and withdrew the interception of wire or oral communications from the ambit of that Section, making Title III the sole governing provision. The legislative history of the amendment seems to us to

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[2] *But see United States* v. *Lanza*, 341 F.Supp. 405, 422 (M.D.Fla. 1972), where the court held that pen register orders fall within Title III when they are issued in connection with a wiretap order.

indicate an intention by the Congress to disavow *Dote* and its progeny.[3]

> This [new] section amends section 605 of the Communications Act of 1934 * *. This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed [Title III] * *. S.Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968), U.S. Code Cong. & Admin. News 1968, p. 2196.

While in agreement that pen register orders are thus not within Title III or Section 605, the parties draw conflicting inferences from this absence of coverage. The Telephone Company argues that absent authorization in Title III or other statutes, the District Court has no authority to order the installation and use of a pen register. The Government argues that a District Court has inherent authority or power under Rule 41, F.R.Cr.P., to issue such an order, subject only to the restraints of the Fourth Amendment. They point to the statement of Justice Powell in *United States* v. *Giordano*, *supra*, 416 U.S. at 553-54, 94 S.Ct. at 1844, 1845 where he stated by way of dictum:

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[3] *United States* v. *Dote*, 371 F.2d 176 (7th Cir. 1966), may, however, retain some residual vitality in cases where a pen register order is issued in conjunction with a wiretap order. *See United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 408, 411, (N.D.Ill., 1976); *United States* v. *Lanza*, 341 F.Supp. 405, 422 (M.D.Fla. 1972).

> Because of pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register.

We take this statement to mean that a pen register order involves a search and seizure under the Fourth Amendment, and that a court may issue such an order only upon a showing of probable cause.

In *United States* v. *Illinois Bell Tel. Co.*, *supra*, the Seventh Circuit, in considering the power of the federal courts to issue pen register orders, concluded that ample authority could be found either in the inherent power of the courts or by analogy to Rule 41, F.R.Cr.P. The court held that a "commonsense approach" dictated that authority tantamount to that found in Rule 41 for the search and seizure of tangible objects be found to exist for an order authorizing the search and seizure of non-tangibles, such as information gleaned from pen register surveillance. *Id.*, at 411. We agree with this reasoning. While the electronic impulses recorded by pen registers are not "property" in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of non-tangible property. *But see In the Mat-*

ter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, 407 F.Supp. 398 (W.D.Mo.1976). Moreover, relying principally on Justice Powell's statement in *United States* v. *Giordano*, *supra*, we agree with the Seventh Circuit that a pen register order may only be issued after a showing of probable cause. We cannot concur in the view, voiced by some commentators, that pen register orders are constitutionally indistinguishable from mail covers, which are initiated by subpoena, and therefore should fall outside Rule 41. *See* Statement of Professor G. Robert Blakey, NWC Law Enforcement Effectiveness Conference 38-39 (1976); Note, "The Legal Restraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell L.Q. 1028 (1975). If anything, we think this argument speaks in favor of more stringent regulation of mail covers, and in no way detracts from our conclusion here.

In our view, the power to order pen register surveillance, whether considered a logical derivative of Rule 41 or a matter of inherent judicial authority, is the equivalent of the power to order a search warrant, and is thus subject to the requirements of the Fourth Amendment. As the order authorizing the installation and use of a pen register was here issued by Judge Tenney upon a showing of probable cause, we conclude that it was properly granted.

II

The next question is whether or not the court below properly ordered appellant to provide technical assistance to federal law enforcement agents in their operation of the pen register. This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding the power of a federal court of mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction.

At the outset it should be noted that we are not concerned with the question of whether the Telephone Company could voluntarily assist in effectuating pen register surveillance, but rather only with whether they may be compelled to do so. Furthermore, we deem unfounded the Telephone Company's stated fear of criminal liability under 47 U.S.C. Section 501 and civil liability under 47 U.S.C. Section 206 for voluntary or compelled assistance in operating the pen register. 18 U.S.C. Section 2520, which provides a civil cause of action for any individual whose wire or oral communication is intercepted in violation of Title III, states that "good faith reliance on a court order * * * shall constitute a complete defense to any civil or criminal action brought under this chapter *or under any other law*." [emphasis added]. Our inquiry is limited to the question of whether or not the District Court had authority to compel assistance,

and if so, whether or not that power was properly exercised.

Prior to its amendment in 1970, Title III was silent as to whether or not a court could order a private party, such as a telephone company, to provide technical assistance to law enforcement officials in the installation and use of wiretap devices. In May, 1970, the Ninth Circuit held in *Application of the United States*, 427 F.2d 639 (9th Cir. 1970) that absent express statutory authorization, a federal district court was without power to compel technical cooperation by the Central Telephone Company of Nevada in the interception of wire communications. Some two months after that decision, 18 U.S.C. Sections 2511,[4]

[4] § 2511. Interception and disclosure of wire or oral communications prohibited

* * * *

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

2518[5] and 2520[6] were amended to provide that a communication common carrier, or other firm or individual, could be compelled to furnish such technical assistance as requested by government agents, without fear of criminal or civil liability.

As we have already said, however, Title III does not cover the issuance of pen register orders or corollary orders compelling technical assistance. While conceding this absence of coverage, the Government contends that the federal courts have either inherent authority or power under the All Writs Act, 28

[5] § 2518. Procedure for interception of wire or oral communications

* * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * * *

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

[6] § 2520. Recovery of civil damages authorized

* * * *

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

U.S.C. Section 1651(a) to compel the Telephone Company to assist in installing and operating the pen register. In support of their argument they cite *United States* v. *Illinois Bell Tel. Co., supra,* where the court found authority for the issuance of such an order to exist on both such bases. It appears that that was the first time a court construed the All Writs Act, or the notion of inherent judicial power, to provide justification for the entry of such an order in aid of its jurisdiction to order a search and seizure. The Seventh Circuit reasoned that since the federal courts have authority to enter orders authorizing government agents to employ a pen register, they must have analogous authority to compel assistance by a telephone company as non-compliance by the company would frustrate the issuance of the pen register order by rendering pen register surveillance technically infeasible.

The All Writs Act provides that a federal court may issue any writ "necessary or appropriate in aid of [its] respective [jurisdiction] and agreeable to the usages and principles of law." Once jurisdiction is properly vested in a federal court on some independent basis, the Act empowers that court to enter such orders as it deems necessary, in its discretion, to preserve and protect its jurisdiction. It must be emphasized that the Act, even if found to be applicable here, is entirely permissive in nature; it in no way mandates a particular result or the entry of a particular order. It is addressed to the discretionary power of the court. Similarly, when one

speaks of inherent judicial authority and argues for its exercise, as does the Government here, one invokes the discretionary power of the court and petitions for the entry of an order not otherwise provided for by specific statutory authority. Thus, even if we were to assume *arguendo*, as we do, that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company, it is for this court to determine whether, on balance, the exercise of that power by the court below was proper or whether it constitutes an abuse of discretion. For the reasons detailed below, we conclude that, assuming the existence of the powers found by the Seventh Circuit, in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance.

Probably the most persuasive point argued by the Government in support of such an order is that without the appellant's technical aid, the order authorizing the use of a pen register will be worthless. Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested requires no extraordinary expenditure of time or effort by appellant; indeed, as we understand it, providing lease or private lines is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or criminal liability; and the order itself provides for financial

compensation for appellant for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered. Notwithstanding the alacrity with which the Congress acted to amend Title III after the Ninth Circuit decision in *Application of the United States, supra*, there is no certainty that the Congress will similarly enact legislation authorizing orders compelling technical assistance in the case of pen register surveillance, or even if they do, that they will act promptly. Undue delay here would predictably impede if not entirely negate the Government's attempts to apprehend the suspected illegal gambling operators.

Against these considerations, however, must be weighed the factors which militate against issuance of an order mandating technical assistance. We think a consideration of these factors compels the conclusion that the issuance of such an order by the court below represented an abuse of discretion.

Congress did act quite rapidly to remedy the absence in the Title III of any provision for compelling technical aid by communication common carriers after the Ninth Circuit rendered its decision. We do not agree with the Seventh Circuit that one may only infer from this speedy action that the Congress must have assumed that the federal courts possessed inherent power to compel assistance or that the telephone companies would voluntarily asist. *United*

States v. *Illinois Bell Tel. Co., supra*, at 412. On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by the Congress was due to a doubt that the courts possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorization should be required in connection with pen register orders, especially as the two are so often issued in tandem.

Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step.

While the Congress can clearly limit authorization for such orders to specific types of assistance and to

federal law enforcement investigations of certain specified crimes, limitations by the courts cannot so easily be drawn, as our authority must be derived from the very general All Writs Act or the even more amorphous notion of inherent judicial power. We must be concerned not only with the Fourth Amendment rights of those whose telephone calls are monitored by pen register surveillance, but with the privacy rights of those third parties, communication common carriers and private parties alike, who might be called upon to aid the Government in its law enforcement endeavors. While a court may immunize such a third party from criminal or civil liability for its technical assistance, there is no assurance that the court will always be able to protect that third party from excessive or overzealous Government activity or compulsion. The potential dangers inherent in such a judicial order, and the future orders it spawns, compel us to conclude that if indeed the Government requires technical assistance, it is far better to have the authority for ordering that assistance clearly defined by statute. We thus agree with the advice of the Ninth Circuit: "If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." *Application of the United States, supra,* at 644. We have every hope that the Congress will promptly undertake consideration of these pen register orders and the technical assistance required to install and operate them.

Accordingly, we affirm Judge Tenney's order insofar as it authorizes the use of a pen register, and reverse that part of the order which mandates assistance by appellant in the installation and operation of the pen register.

MANSFIELD, Circuit Judge (concurring and dissenting):

I agree with the majority's holding that the district court possessed the power to order installation of a "pen register." However, I cannot agree that it was an abuse of discretion to require the Telephone Company to assist in installing it. On the contrary, a direction that the Telephone Company render assistance was obviously essential to implement the court's pen register order since otherwise that order would amount to nothing more than an empty gesture. The assistance order was therefore well within the district court's discretionary authority under the All Writs Act, 28 U.S.C. § 1651 (a) and no further specification of authority by Congress was required. Accordingly, I would affirm.

Judge Medina's opinion starts out on a satisfactory enough note by correctly concluding that the district court had jurisdiction to authorize installation of the pen register by federal agents upon a showing of probable cause. See *United States* v. *Giordano*, 416 U.S. 505, 553-54, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, *J.*, concurring and dissenting); *United States* v. *Illinois Bell Telephone Co.*, 531 F.2d 809, 812-13 (7th Cir. 1976). The majority then

assumes (without expressly deciding) that the All Writs Act provides the court with such authority as it needs to require Telephone Company assistance. In my view this assumption also is clearly correct.

The All Writs Act provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Although the Act does not itself furnish jurisdiction, see e.g., *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U.S. 109, 27 S.Ct. 24, 51 L.Ed. 111 (1906), it does authorize the court in proper cases to issue auxiliary orders necessary to render effective its exercise of jurisdiction otherwise obtained. "[A] federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942). See *Hamilton* v. *Nakai*, 453 F.2d 152, 157 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed. 2d 332 (1972) ("[O]nce jurisdiction has attached, powers under § 1651(a) should be broadly construed.") The power conferred by the Act extends to issuing injunctions and other writs against persons who, though not parties to the original action, may thwart the effectuation of the court's decision. See *Mississippi Valley Barge Line Co.* v. *United States*, 273 F.Supp. 1, 6 (E.D.Mo.1967), *aff'd mem.*, 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed.2d 779 (1968).

It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co.*, *supra*, the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant. But such an order is no more novel than others issued under the Act, which have been upheld when needed to implement a court's decisions. See, e.g., *Board of Education* v. *York*, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 968, 28 L.Ed.2d 237 (1971) (order requiring parents to send son to particular school to further desegregation plan); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C.Cir.), *rehearing en banc denied*, 118 U.S.App.D.C. 90, 331 F.2d 1010, *cert. denied*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964) (one-judge order requiring blood transfusion); *United States* v. *Field*, 193 F.2d 92, 95-96 (2d Cir.), *cert. denied*, 342 U.S. 894, 74 S.Ct. 202, 96 L.Ed. 670 (1951) (order requiring bail committee members to answer questions regarding fleeing defendants).

Once we agree that the district court had jurisdiction to issue a pen register order and authority under the All Writs Act to direct third parties to render such assistance as is reasonably necessary to implement its exercise of jurisdiction, I find it impossible on this record to accept the majority's conclusion that it was an abuse of discretion to direct that such assistance be rendered in this case. As the majority

opinion notes, the assistance of the Telephone Company was here necessary for the installation of the pen register; due to the physical peculiarities of the location to be put under surveillance it would have been difficult if not impossible, for the agents to install the device on their own without detection. Furthermore, the Telephone Company concedes that the assistance required of it was not burdensome; all that was required was the provision of certain plans and the flicking of a switch at a central terminal. Finally, the intrusion into the privacy of the targets of the surveillance and their communications was less than would occur had the government sought authorization of a Title III wiretap; only the destination, not the content, of telephone messages was to be monitored.[1] It is the function of the district court to weigh such considerations when exercising its discretion, and in this case the balance clearly points toward requiring Telephone Company assistance.

Despite the compelling case made out here for exercise of discretion in favor of the assistance order,

[1] It is possible that the result of holding that the Telephone Company cannot be required to give assistance in the installation of a pen register may be, paradoxically, to increase the amount of electronic surveillance. Since the Telephone Company can be required under the 1970 amendment to Title III, 18 U.S.C. § 2518(4), to provide assistance in installing a Title III wiretap, law enforcement agents may be compelled to seek such wiretap authority in order to receive Telephone Company assistance, even if their primary interest lies simply in determining the locations to which calls are placed rather than in the monitoring of content which the wiretap would permit.

the majority has concluded that the district court's action represented an abuse of discretion. None of the reasons offered in support of that conclusion, however, can withstand scrutiny. First it is suggested that the 1970 amendment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, following the decision in *Application of United States*, 427 F.2d 639 (9th Cir. 1970), represented implicit Congressional approval of the Ninth Circuit's view that a court does not have power under the All Writs Act or otherwise, to require Telephone Company assistance in electronic surveillance.[2] The Supreme Court has, however, long cautioned against drawing the inference that an express Congressional grant of authority to an agency necessarily implies that the agency previously lacked such authority. As Justice Jackson wrote in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47, 70 S.Ct. 445, 453, 94 L.Ed. 616 (1950), "we will not draw the inference . . . that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." See *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-12, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966) (FTC requests

[2] The majority's view of the Congressional intent behind the 1970 amendment can find no support in the meager legislative history of the amendment, which was approved as a rider to the District of Columbia Court Reform and Criminal Procedure Act of 1970.

for specific authority to seek injunctions against mergers, even if granted, would not imply such power was lacking under the All Writs Act). Thus, it is impossible to conclude that because Congress acted to provide express authority to the courts to require Telephone Company assistance in installing Title III wiretaps, similar express authorization is required to issue the present order involving a pen register which both parties agree is wholly outside the ambit of Title III. Although Congressional clarification of the court's power to order Telephone Company assistance in the installation of pen registers would place the matter beyond argument, it is wholly unnecessary to impose this burden upon Congress. The district court clearly possesses the authority under the All Writs Act.

The majority next concludes that, although an assistance order may be desirable in the circumstances of the present case, it would be the first step down a slippery slope in which law enforcement agents would obtain judicial orders requiring progressively more assistance from third parties in furtherance of government investigations. Here I must respectfully disagree. To hold that the district court acted properly within the scope of its powers in the present case would not write a carte blanche for any and all orders which law enforcement agencies might seek in the future. While the powers conferred by the All Writs Act are broad, they are to be reserved for cases of clear necessity, as this court has frequently observed in passing upon demands that it exercise

its power under the Act to issue mandamus to district courts. See, e.g., *United States* v. *Weinstein*, 511 F.2d 622, 626 (2d Cir.), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975); *United States* v. *Dooling*, 406 F.2d 192, 198 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969); *Electric & Musical Industries Ltd.* v. *Walsh*, 249 F.2d 308 (2d Cir. 1957). We have had sufficient confidence in our district judges over the past century to vest them with discretionary power to issue such extraordinary relief as temporary restraining orders and preliminary injunctions. I see no reason for not trusting them to employ sensible standards in deciding whether auxiliary relief should be granted under the All Writs Act. Because of the combination of clear necessity for Telephone Company assistance and the minimal burdens on that company, this is a case where application of such standards mandates assistance from the Telephone Company. Were the necessity lesser, or the burden greater, in some future case, a district court might not be justified in invoking its extraordinary powers. That is what exercise of discretion is all about. I see no reason to assume that the district courts will in the future grant law enforcement agencies such relief on anything less than a showing of the compelling nature here made, or that, in reviewing such orders, future panels of this court will be any less sensitive than the present majority to the problems involved.

Nor can I agree with the majority that Congress, as distinguished from federal courts, is in a better

position to define the conditions under which assistance by third parties may be ordered or the scope of that assistance. Surely it did not do so in its 1970 amendment of Title III [3] and no necessity for doing so in the present case has been shown. Aside from the obvious need for minimal help from the Telephone Company in the present case, there is no basis for believing that the government will need, much less demand, other types of assistance in the investigation of other types of crimes. In any event, since the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint. In short the majority, ignoring the principle that "Sufficient unto the day is the evil thereof," [4] paints imaginary and unlikely devils on the wall. However, should these devils ever appear in real life, I am confident that the district courts' sound exercise of discretionary power would be more than sufficient to deal with them.

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[3] The 1970 amendment simply and broadly authorizes courts to require communications carriers to provide "all information, facilities, and technical assistance necessary" in installing Title III wiretaps. 18 U.S.C. § 2518(4).

[4] New Testament: Matthew, vi, 34.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of July, one thousand nine hundred and seventy-six.

Present: HON. HAROLD R. MEDINA
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges.

76-1155

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY, ("TELEPHONE") APPELLANT.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the order of said district court be and is hereby affirmed in part and reversed in part in accordance with the opinion of the court.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-six.

Present: HON. HAROLD R. MEDINA
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges.

76-1155

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY, ("TELEPHONE")
APPELLANT.

A petition for a rehearing having been filed herein by counsel for the United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and seventy-six.

IN RE

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

NEW YORK TELEPHONE COMPANY,
APPELLANT.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the United States of America, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judges Timbers, Gurfein and Van Graafeiland did not participate in consideration of the petition.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Misc. No. 19-97(44)

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILIAR MECHANICAL DEVICE.

MEMORANDUM

APPEARANCES

GEORGE E. ASHLEY
Attorney for New York Telephone Company
1095 Avenue of the Americas
New York, N.Y. 10036

Of Counsel: FRANK R. NATOLI

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
St. Andrews Plaza
New York, N.Y. 10007

Of Counsel: PETER D. SUDLER
Special Attorney
U.S. Department of Justice

TENNEY, J.

On March 19, 1976, this Court granted the application of the Department of Justice[1] for an order

[1] The Government's application was submitted by Peter D. Sudler, a Special Attorney of the United States Department of Justice, New York Joint Strike Force Against Organized Crime. The application was supported by the affidavit of Walter F. Smith, a Special Agent of the Federal Bureau of Investigation.

directing New York Telephone Company[2] ("Telephone") to furnish the information, facilities, and technical assistance necessary to enable agents of the Federal Bureau of Investigation ("FBI") to install "pen registers" on two telephones. The application specified two telephones subscribed to by a specified individual and located at a specific address. In response to the Court's order, Telephone moved, by order to show cause, to vacate or to modify the order. While not contesting the right of the Government to employ the "pen register", Telephone objected to so much of the Court's order as directed it to provide all information, facilities (including lease lines), and technical assistance necessary for the utilization of the "pen register".

Based upon the papers submitted and the arguments heard and for the reasons stated below, the motion to vacate or modify this Court's previous order is hereby denied.

Telephone challenges the Court's direction that it furnish technical assistance, including lease lines, to law enforcement officials for installation and utilization of the "pen register". Telephone does not challenge the Court's jurisdiction to authorize use of the "pen register", nor does it contend that there

[2] New York Telephone Company is a communications common carrier as defined in 18 U.S.C. § 2510(10).

was no probable cause supporting the Court's order. Indeed, Telephone has been willing and continues to be willing to provide the Government with all the necessary information that would enable the FBI to install a "pen register". It is Telephone's position, however, that its facilities and technical assistance may be furnished to law enforcement officials only pursuant to an application under 18 U.S.C. §§ 2510 *et seq.* These sections constitute Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"). Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." *United States* v. *Giordano*, 416 U.S. 505, 507 (1974). Briefly, the Act confers power upon the Attorney General or a specially designated Assistant Attorney General to apply for a federal court order authorizing wire interceptions. 18 U.S.C. § 2816(1).

A "pen register" is a mechanical device which picks up electrical impulses which are used to decode the telephone numbers dialed in outgoing calls.[3] Tele-

[3] A "pen register" is more fully defined and explained as follows:

> "A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court. 340 F. Supp. 1033, 1038-1041 (Md. 1972)." *United States* v. *Giordano, supra*, 416 U.S. at 549 n. 1.

phone concedes that the application for a "pen register" is *not* an application for a wire or oral interception within the purview of Title III. (Telephone's Memorandum of Law at 5).

There is significant authority for this Court to find that the "pen register" in this instance was not a device for wire or oral interception covered by the prescriptions of Title III. 18 U.S.C. § 2510 contains the following definition:

> "As used in this chapter—
>
> (4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

"Aural" has been defined as "'of or relating to the sense of hearing.'" *United States* v. *Focarile*, 340 F. Supp. 1033, 1039 (E.D. Mo.), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (3rd Cir. 1972), *aff'd*, 416 U.S. 505 (1974), *quoting* Webster's Third New International Dictionary. A "pen register" decodes phone numbers by responding to electric impulses and not to aural stimuli.

The legislative history of Title III clearly discloses a Congressional intent to exclude "pen registers" from the Act's strictures.

> "Paragraph (4) defines 'intercept' to include the aural acquisition of the contents of any

wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See *Lee* v. *United States*, 47 S.Ct. 746, 274 U.S. 559 [71 L.Ed. 1202] (1927); *Corngold* v. *United States*, 367 F.2d [1] (9th 1966). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an 'interception.' (*United States* v. *Russo*, 250 F.Supp. 55 (E.D.Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. *The use of a 'pen register,' for example, would be permissible.* But see *United States* v. *Dote*, 371 F.2d 176 (7th 1966). *The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication.*" (Emphasis added). S. Rep. No. 1097, 90th Cong., 2d Sess. at 90 (1968), 1968 U.S. Code Cong. & Admin. News, p. 2178.

Various federal courts have adopted the position that a "pen register" device is not governed by Title III. *See United States* v. *Illinois Bell Telephone Co.*, No. 75-1909 (7th Cir., February 23, 1976), at 3; *United States* v. *Clegg*, 509 F.2d 605, 610 (5th Cir. 1975); *United States* v. *Falcone*, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *United States* v. *Finn*, 502 F.2d 938, 942 (7th Cir. 1974); *United States* v. *Brick*, 502 F.2d 219, 223 (8th Cir. 1974); *Korman* v. *United States*, 486 F.2d 926, 931 (7th Cir. 1973); *United States* v. *King*, 335 F. Supp. 523 (S.D.Cal. 1971), *aff'd in part*,

rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States* v. *Vega*, 52 F.R.D. 503 (E.D.N.Y. 1971). Finally, Mr. Justice Powell reiterated this conclusion in his opinion (concurring in part and dissenting in part) joined by The Chief Justice and Mr. Justice Blackmun and Mr. Justice Rehnquist in *United States* v. *Giordano*, *supra*, 416 U.S. at 553-54.[*] This Court likewise holds that a "pen register" falls outside of Title III's definition of "interception".

Without disputing the nonappiicability of Title III, Telephone contends, however, that this Court's order authorizing the use of a "pen register" device "directs Telephone to furnish the FBI with the capaiblity to perform an *interception*" (Natoli Affidavit at 3), and that a court order directing an interception must comply with the strictures of Title III. (Natoli Affidavit at 3; Telephone Memorandum of Law at 7). Although the order employs the term "interception", it clearly does not direct that type of

---

[*] In *United States* v. *Giordano*, *supra*, 416 U.S. 505, a Title III interception order was improperly obtained by an unauthorized official. The Supreme Court approved the suppression of all evidence resulting from the unlawful wiretap. Information revealed from the wiretap had formed the basis of probable cause upon which "pen registers" were subsequently authorized. The Court concluded that evidence resulting from the "pen registers" was tainted by its indirect connection with the unlawful wiretap, and was therefore inadmissible under a "fruit of the poisonous tree" rationale.

One court has observed that the substance of the minority opinion is not inconsistent with the majority holding. *See discussion* in text p. 7, *infra*.

interception contemplated by Title III. The order specifically permits only that interference, from the installation and operation of the device, necessary for the *limited* purpose of obtaining the telephone numbers of outgoing calls.

This Court adopts the jurisdictional basis for the issuance of a "pen register" that was enunciated by Mr. Justice Powell in the *Giordano* case. The minority opinion explained that

> "[b]ecause a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register." *United States* v. *Giordano*, *supra*, 416 U.S. at 554.

The minority noted further:

> "The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." *Id.* at n. 4.[5]

---

[5] *Accord*, *United States* v. *Finn*, *supra*, 502 F.2d at 940; *United States* v. *Brick*, *supra*, 502 F.2d at 223-24. *But see United States* v. *Clegg*, *supra*, 509 F.2d at 610, holding that a "pen register" does not involve a "search" within the scope of the Fourth Amendment.

Telephone does not contest the existence of probable cause underlying the issuance of the court order. The "pen register" was ordered pursuant to affidavits concerning an on-going investigation of a criminal operation for which a wiretap order had been previously authorized under Title III. This investigation, then, concerns an offense deemed serious enough to justify a Title III interception. Refusal of Telephone to assist in furnishing technical assistance and facilities would frustrate the operation of the court order, properly granted upon a showing of probable cause.

On facts substantially similar to those in the instant case, the Seventh Circuit Court of Appeals cogently reconciled Mr. Justice Powell's minority opinion with that of the majority in the *Giordano* case.

> "There seems nothing essentially inconsistent with this order-application accommodation in the majority opinion which rejected the evidence obtained from the use of the pen register, not because of a lack of judicial authority to issue the form of order used, but the evidence was '. . . derived from . . . [an] invalid wire interception. . . .' 416 U.S. at 511 n. 2 and 533-34 n. 19. Apparently, Fed. R. Cr. P. 41, which deals with the traditional concept of search and seizure and which lodges jurisdiction and authority in the district courts to issue search warrants to search and seize 'tangible' objects was not thought by the Supreme Court to be a limitation upon the power of the district court to authorize, outside Title III, reasonable use of

investigative techniques rendered possible by modern technology as to 'nontangibles'. The commonsense approach used by the district court in issuing an order based on probable cause and following a procedure designed to comply with Fourth Amendment considerations in authorizing the use by the government of the pen register was a valid exercise of authority." *United States* v. *Illinois Bell Telephone Co., supra,* No. 75-1909, at 5.

Finding jurisdiction for issuance of the court order under this "commonsense approach," the Seventh Circuit likewise found "inherent authority" for the district court to direct Illinois Bell's compliance with and assistance in the installation of a "pen register" by federal law enforcement agents. The court concluded that

> "district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders. It seems more congruent with both reason and Congressional intent to have courts, rather than the telephone company, decide if a pen register should or should not be used. The authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former the latter would be worthless.
>
> "It is conceded that the district court had authority to enter an order authorizing government law enforcement agents to employ a pen register. Therefore, analogous authority for the proposition that the telephone company cannot frustrate the exercise of the district court's

order by refusing to make available its facilities and knowhow, is the All Writs Act. The All Writs Act, 28 U.S.C. § 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This statute allows a district court to defend a proper exercise of is [sic] jurisdiction, although it does not supply jurisdiction." *Id.* at 7-8.

This Court adopts the sound reasoning of the Seventh Circuit and holds that it possesses inherent jurisdiction to direct Telephone's compliance with the order. Furthermore, this Court finds jurisdiction for its directive under the All Writs Act. The mandate to Telephone is necessary to protect and effectuate the purpose of the concededly valid "pen register" order.

Accordingly, the application of Telephone to vacate or modify this Court's order authorizing the use of a "pen register" is in all respects denied.

So ordered.

Dated: New York, New York
April 2, 1976

CHARLES H. TENNEY
U.S.D.J.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 225455 32

Supreme Court, U. S.
FILED
MAR 11 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-835

UNITED STATES OF AMERICA,
Petitioner

v.

NEW YORK TELEPHONE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 20, 1976
CERTIORARI GRANTED JANUARY 25, 1977

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Judge Charles H. Tenney, Southern District of New York, of February 19, 1976, the interception of wire communications through New York telephone number (212) 877-4425, subscribed to by GEORGE VLACHOS, and located in Apartment 1-I, at 344 West 72nd Street, New York, New York, was conducted by Special Agents of the Federal Bureau of Investigation. The affidavit of Special Agent Richard W. Keifer in support of United States District Court Judge Tenney's order is therefore attached to this affidavit as Exhibit A and is hereafter incorporated by reference. The interceptions of wire communications conducted, pursuant to Judge Tenney's order, have provided the affiant with probable cause to believe that during the period of interception from February 19, 1976 through March 8, 1976:

(a) MITCHELL DRUCKER, EUGENE MASSAR, and DON (Last Name Unknown) interchangeably used New York telephone number (212) 877-4425 to receive an average of 70 separate gambling related telephone conversations each day, and to receive an average of $19,000 each day in gambling wagers.

(b) During the aforementioned period of interception, no outgoing calls were made through New York telephone number (212) 877-4425.

(c) MITCHELL DRUCKER, EUGENE MASSAR, and DON (Last Name Unknown) have also used New York telephone number (212) 595-6849, subscribed to by MARY M. DEWAN, and also located in Apartment 1-I at 344 West 72nd Street, New York, New York, to conduct an illegal gambling enterprise and further, New York telephone number (212) 595-6849 was employed by MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, to transmit gambling information by making outgoing calls to associates and confederates in furtherance of the conspiracy to violate Title 18, United States Code, Section 1952, and in violation of Title 18, United States Code, Section 371.

5. Physical surveillances conduced by Special Agents of the Federal Bureau of Investigation during the interception period at 314 West 72nd Street, revealed MITCHELL DRUCKER and EUGENE MASSAR to enter these premises between 5:15 PM and 5:25 PM, and to exit these premises between 8:10 PM and 8:15 PM on weekdays, and revealed MITCHELL DRUCKER and EUGENE MASSAR to enter these premises between 11:15 and 11:40 AM and exit the premises between 8:10 and 8:15 PM on Saturdays, and further, revealed EUGENE MASSAR and DON (Last Name Unknown) to enter these premises between 11:15 and 11:45 AM and exit these premises between 2:00 and 2:30 PM on Sundays.

6. Physical surveillances conducted by Special Agents of the Federal Bureau of Investigation at 344 West 72nd Street failed to reveal either EUGENE MASSAR or MITCHELL DRUKER entering or existing these premises on or after March 11, 1976.

7. Physical surveillances conducted by Special Agents of the Federal Bureau of Investigation in the vicinity of 220 East 14th Street, revealed the following activities on the dates indicated:

Date/Time	*Individual*	*Activity*
March 11, 1976 5:15 PM	EUGENE MASSAR and MITCHELL DRUCKER	Observed on 14th Street between Second and Third Avenue.
March 16, 1976 5:19 PM	EUGENE MASSAR and MITCHELL DRUCKER	Enter 220 East 14th Street
8:11 PM	EUGENE MASSAR, MITCHELL DRUCKER, and unidentified white male	Exit 220 East 14th Street
March 17, 1976 5:20 PM	EUGENE MASSAR, and MITCHELL DRUCKER	Enter 220 East 14th Street
8:11 PM	EUGENE MASSAR, MITCHELL DRUCKER, and unidentified white male	Exit 220 East 14th Street

(a) The unidentified white male referred to above has been described as being 20 to 25 years of age, 5'8" to 5'10"; slender build, curly brown hair, sharp features.

8. Source A advised Special Agent William P. Flynn on March 16, 1976, that the operation utilizing New York telephone number (212) 877-4425 had re-located and was cur-

rently receiving line information and wagers through New York telephone number (212) 533-1927.

(a) Source A has furnished information pertaining to illegal gambling business in the New York City area on more than 40 occasions since May of 1972.

(b) Information provided by Source A has resulted in the approval and execution of a New York State search warrant and two Federal orders to intercept wire communications involving illegal gambling operations, including the interception approved by United States District Judge Tenney, the affidavit in support of which is attached hereto.

(c) Source A referred to in this affidavit is unwilling to testify against NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown concerning this gambling operation because of the probability of retaliation and fear of physical harm.

9. Special Agent Frank J. Meyers was advised by the New York Telephone Company on March 16, 1976, of the identity of the subscriber to the following telephone numbers:

(212) 533-1927	T. HAMILTON 220 East 14th Street New York, New York
(212) 674-2667	T. HAMILTON 220 East 14th Street New York, New York

THEREFORE, the affiant submits that the information obtained through the interception of wire communications to and from New York telephone number (212) 877-4425, pursuant to the order of United States District Court Judge Charles H. Tenney, Southern District of New York, on February 19, 1976, and the information developed in the course of the investigation as set forth in all the preceding paragraphs and the affidavit of Richard W. Keifer, appended hereto as Exhibit A, provides sufficient facts to establish that NICHOLAS R. TORETTO, HOWARD

WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, have been, are, and will continue to commit offenses involving the use of New York telephone numbers (212) 533-1927 and (212) 674-2667, subscribed to by T. HAMILTON and located at 220 East 14th Street, as an integral part of a continuing conspiracy to conduct an illegal gambling enterprise in violation of Sections 1952 and 371 of Title 18, United States Code.

WHEREFORE, the affiant respectfully requests that an order issue, authorizing the affiant and other Special Agents of the Federal Bureau of Investigation to place pen registers or similar mechanical devices on the telephones bearing numbers (212) 533-1927 and (212) 674-2667, subscribed to by T. HAMILTON and located at 220 East 14th Street, New York, New York, until such time as the telephone numbers of all outgoing calls dialed lead to the identities of the associates and confederates of NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown, and to the location of other places of operation, or until the expiration of twenty (20) days from the date of this order, whichever is earlier.

/s/ Walter F. Smith
WALTER F. SMITH
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn to before me
this 19 day of March, 1976
/s/ Charles H. Tenney
UNITED STATES DISTRICT
JUDGE

[Exhibit A omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE	Misc. No. 19-97 (44)

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Affidavit having been made before me by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and full consideration having been given to the matters set forth therein the court finds:

(a) there is probable cause for belief that NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown have committed, are committing, and will continue to commit offenses listed in Section 2516 of Title 18, United States Code, involving the use of facilities in interstate commerce in order to promote, manage, establish and carry on an unlawful activity, to wit: a gambling enterprise in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such an offense in violation of Section 371 of Title 18, United States Code;

(b) there is probable cause to believe that the telephones subscribed to by T. HAMILTON, and located at 220 East 14th Street, New York, New York, and bearing telephone numbers (212) 533-1927 and (212) 674-2667, have been, are being, and will continue to be used by MITCHELL DRUCKER, EUGENE MASSAR, DON (Last Name Unknown), and others as yet unknown in commission of the above described offenses.

WHEREFORE, it is hereby ordered that the New York Telephone Company, a communication carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

WHEREFORE, it is further ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install mechanical devices on the telephones subscribed to by T. HAMILTON, and located at 220 East 14th Street, New York, New York, and bearing telephone numbers (212) 533-1927 and (212) 674-2667, which telephones have been, are being, and will continue to be used at said address.

(b) operate such mechanical device until the telephone numbers of all outgoing calls dialed lead to the identities of the associates and confederates of NICHOLAS R. TORETTO, HOWARD WILLIAM GOLDMAN, MITCHELL DRUCKER, DON (Last Name Unknown), and EUGENE MASSAR, and their places of operation, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

Provided that the operation of this device must terminate upon attainment of the authorized objective, or in any event, at the end of twenty (20) days from the date of this Order.

Dated: March 19, 1976

/s/ Charles H. Tenney
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	ORDER TO SHOW CAUSE WITH A STAY Misc. No. 19-97(44)

Upon the annexed affidavits of FRANK R. NATOLI and WILLIAM F. McGARTY, duly sworn to the 30th day of March, 1976, and upon motion of GEORGE E. ASHLEY, attorney for the New York Telephone Company, it is hereby Ordered, that

WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, show cause before this Court at a Term for Motions to be held in Room 1105 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 31st day of March, 1976, at 3:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the order of this Court dated March 19, 1976, directing the New York Telephone Company to furnish Special Agents of the Federal Bureau of Investigation with all information, facilities (including lease lines) and technical assistance necessary to effectively utilize a pen register, should not be vacated, and why such other and further relief as to this Court may seem just and proper should not be granted.

Sufficient reason appearing therefor, it is

ORDERED that sufficient notice of this application shall be deemed to have been given if service of a copy of this Order to Show Cause and the papers upon which it was granted, is made at or before 4:00 P.M. on the 30th day of March, 1976, personally on WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized

Crime and Racketeers for the Southern District of New York, at St. Andrews Plaza, New York, N.Y.

Dated: New York, New York
March 30, 1976

/s/ CHARLES H. TENNEY
U.S.D.J.

[Paragraph in Order to Show Cause which would have stayed the pen register order was stricken by Judge Tenney]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	Misc. No. 19-97(44)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

FRANK R. NATOLI, being duly sworn, deposes and says:

1. I am employed by New York Telephone Company as an Attorney in the Legal Department, Litigation Section. From time to time during my career in the Legal Department, I have been involved in matters concerning our Security Division and its liaison with law enforcement agencies. I am fully familiar with the facts and prior proceedings herein and make this affidavit in support of Telephone's motion to modify or vacate this Court's order of March 19, 1976, made and entered in this proceeding.

2. Subsequent to March 19, 1976, I was informed by Kenneth J. Lucey, General Litigation Attorney, that a Special Agent of the Federal Bureau of Investigation, United States Department of Justice ("FBI"), had secured an order of this court to place a pen register on certain telephone numbers in the City of New York. I was further advised that Telephone had been served with said order on March 24, 1976, and that it might be necessary for Telephone to appear in Court to modify or quash the said order.

3. I contacted William F. McGarty, Security Supervisor of Telephone who informed me that Telephone had, after the receipt of the order of March 19, 1976, (annexed hereto as Exhibit I), supplied the FBI with appearance information and/or terminal locations as was orally requested by the FBI Agent.

4. It must be noted that Telephone is further willing to provide the FBI with all information concerning the necessary pair and cable. Once this information is fur-

nished, the FBI will have the *full* capacity to install a pen register without further assistance of Telephone.

5. The order, however, further directed Telephone to furnish the FBI with facilities which, in common parlance of Telephone terminology, includes lease lines and technical assistance in order to facilitate the installation of a pen register on the subject telephone lines. It is the position of the New York Telephone Company that factilities and technical assistance may only be furnished to law enforcement officials under a Title III application, pursuant to § 18 U.S.C.A., §§ 2510 *et seq.* (1970) (hereinafter, "Title III"). This section requires a company such as Telephone to provide whatever technical assistance is necessary in order to permit the Government to install electronic surveillance equipment on telephone lines. Telephone has on several occasions in the past complied with numerous Title III court orders, but has not to my knowledge, furnished said assistance in non-Title III applications.

6. It must be pointed out that although the caption of the order indicates the Government is requiring facilities to install a pen register, the body of the order is worded in such a fashion that it directs Telephone to furnish the FBI with the capability to perform an *interception*. It is unquestioned that any order directing the interception of communications must be obtained under Title III. It is clear that the instant order was *not* obtained pursuant to the provisions of Title III. It is a jurisdictional requirement that a Title III order contain the prior approval of the Attorney General or a designated Assistant Attorney General, 18 U.S.C.A. § 2518. On its face the order is void since it does not have such prior approval contained therein. Further, the Court is without authority to compel any *interception* of communications without a valid Title III application. Accordingly, the instant order was not issued under Title III. Therefore, the Court cannot look to that statute for its authority to issue the present order.

7. It may be contended that the Court had authority to issue the order pursuant to F. R. Cr. P. 41. This position is similarly untenable. Rule 41 is a codification of the Fourth Amendment to conduct a search and the Court may only authorize a civil officer or other federal law official to effect the search. Rule 41 cannot be construed to compel a

private party (Telephone) to actively assist in conducting a search during a criminal investigation. Rule 41 does not authorize the Court to deputize Telephone and it applies only to law enforcement authorities. Further, Rule 41 provides for the search and seizure of "tangible" objects. It is seriously doubted that electronic pulses or tones registered by a pen register can be considered "tangible" within the meaning of that Rule.

7. Under the procedure of Rule 41 there must be an execution and a return within 10 days. This order provides for 20 days. Upon the seizure of the property, a receipt is required to be given and an itemized inventory must be made. All of these elements appear lacking in this case. Therefore, Rule 41 does not appear to be the basis for granting the Court jurisdiction to issue the order herein to Telephone.

8. The All Writs Statute cannot confer jurisdiction when the Court has none. Said statute is a non-jurisdictional one. Hence, before the Court may utilize that statute, it must first find some other basis to grant jurisdiction. It is fundamental that district courts are courts of limited jurisdiction and possess only those powers which are enumerated in Article III of the Constitution of the United States and any additional powers which Congress may grant to them under the Constitution.

9. If there is no statutory authority to issue the present order, the next possibility is that the Court possessed some "inherent authority" to do so. As to this proposition, the Court of Appeals for the 9th Circuit, *Application of United States,* and 8th Circuit decision decided January 19, 1976, clearly established that the Court, in a non-Title III application, does not have "inherent authority" to issue an order utilizing use of a pen register by FBI authorities. These findings and the other points covered in the prior paragraphs are covered more fully in a memorandum of law which will be submitted.

10. To compel Telephone to actively assist in a criminal *investigation* when it refused to do so, absent statutory authority, deprives Telephone of its right to refuse without due process of law. Nor can the theory of *posse comitatus* be applied, since this is not a situation where the FBI is seeking aid to keep the peace and it is not in pursuit and

seeking arrest of a *known* law breaker. It is only under those situations where said principle might be applied. It has never been applied to compel private persons (Telephone) to help a law enforcement agency to *investigate* suspected criminals.

11. It must further be noted that if the district court's order of March 19, 1976 is not a "demand of other lawful authority" as required under § 605 Communications Act, then Telephone could be subjected to both civil and criminal liability. For some unexplained reason the Government has decided to proceed with a non-Title III application. It is strange because the crime which is being investigated, namely 18 U.S.C. § 19[52], is one of the crimes enumerated in Title III. If the Government would consent to the vacating of the present order, it could obtain all the information, including the lease lines and technical assistance it desires. Courts in several jurisdictions have affirmed the right of the Government to obtain a pen register when used in conjunction with a wiretap order (Title III). In a good faith effort to resolve this matter expeditiously and without prejudice to either the rights of the FBI, Telephone and/or the public, it is suggested to the Court that the Government proceed by Title III. There appears little reason for the Government to obtain the full wiretap capabilities simply by attempting to obtain a pen register in a non-Title III application. Under a non-Title III application, the Government can circumvent all of the safeguards and requirements of Title III and yet obtain the full capability of wiretapping. Such a procedure certainly is not within the true spirit of the law. Congress intended to protect the Government, Telephone and the public in general by the enactment of Title III. When the Government can utilize Title III, it should be required to do so and not look to cut corners.

12. The issues being presented to this Court are currently pending in a lawsuit before the Court of Appeals, 5th Circuit, *Southern Bell* v. *United States.* Oral argument was had before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future. In view of the above, the present order raises very substantial legal questions as to the power of this Court to issue said order. I believe it has been demonstrated that in issuing the order of March 19, 1976, the

Court lacked lawful authority to compel Telephone to provide all information, facilities and technical assistance for a pen register and said order should be vacated.

No previous application has been made.

Sworn to before me this
30th day of March, 1976.

FRANK R. NATOLI

RICHARD H. BYNUM

Order to show cause is necessary since the order has a time limitation of 20 days from March 19, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

WILLIAM F. McGARTY, being duly sworn, deposes and says:

1. I am employed by the New York Telephone Company (hereinafter referred to as "Telephone") as Security Supervisor. I have served in various capacities for Telephone in the Plant Department, which installs and repairs communication facilities of Telephone. I have been in the Security Division approximately 8½ years where I served as an Investigator for about two years prior to my promotion to Security Supervisor.

2. In my capacity as Security Supervisor, I am primarily responsible for liaison with all law enforcement authorities—local, state and federal. Based upon my experience, I am thoroughly familiar with the functions and use of a device known as a pen register.

3. A pen register is a mechanical device which is physically connected to the telephone line of a subscriber. It records on paper tape all the numbers dialed from the telephone instrument to which it is connected. It will record all such numbers whether or not the call is answered. The electrical impulses emanating from the use of the dial to which a pen register is attached record markings on paper tape which can be translated into the number dialed.

4. In order to install a pen register, it is only necessary to identify the "pair" (twin wires composing the circuit of a telephone line) and the "cable" in which the pair is located at which access to the subscriber's line may be obtained. In addition, it is necessary to identify the location

of "appearances" for such telephone line which are located outside of a subscriber's premises and Telephone's central office. An "appearance", of which there may be several, may be located in the basement of an apartment house, a telephone pole, a rear wall of a building, etc. A pen register may be attached at any of these "appearance" locations.

5. "Leased lines" which are sought in this proceeding are telephone pairs which are made available from one terminal or "appearance" location to another terminal or "appearance" location at a remote place, which remote place can be selected by any person properly ordering leased line facilities. The remote place may be an office, store front, basement, etc., and the leased lines will, of course, transmit any dial pulses or conversation between the two locations as above described.

6. The location of the "appearance", together with the pair and cable information, may be used to eavesdrop and/or install a listening and recording device in such remote places and, with leased lines, eavesdropping and recording may be done at a remote place. It is noted that once a pen register has been installed, a full wiretap "interception" of telephone conversation *may* be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit.

7. On March 24, 1976, a copy of an order of this Court, dated March 19, 1976, entered in the above entitled proceeding was presented to Telephone by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice. This order authorized special agents of the Federal Bureau of Investigation to install a pen register on particular telephone numbers in New York City, New York, an area which is serviced by Telephone. Under my supervision Telephone provided the appearance information and/or terminal locations as requested by the agent. We are further willing to provide information concerning the necessary pair, cable and appearance information. This is more fully described in paragraph "6" above. The information which we are willing to furnish is sufficient for the installation of a pen register device and/or the installation of eavesdropping devices. The Federal Bureau of Investigation with the information we are willing to furnish will have the full capacity to install a pen register without

any further assistance of Telephone. However, we are not willing to provide facilities (lease lines) as required by said order.

8. The order which was served on March 24, 1976, directed Telephone to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are being *intercepted*, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates." Clearly, the reading of said order is directing Telephone to provide lease lines which I, after consultation with the Legal Department of Telephone, refused to provide in any manner other that that which I have previously indicated, as described in paragraph "7" above. The order is affirmatively directing Telephone to physically set up the facilities (lease lines) and technical assistance which, I am advised by Telephone counsel, is improper and not under lawful authority.

Sworn to before me this
30th day of March, 1976

/s/ William F. McGarty
WILLIAM F. MCGARTY

RICHARD H. BYNUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:
APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.

Affidavit
Misc. No. 19-97 (44)
(C.H.T.)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK
ss.:

1. I am a Special Attorney of the United States Department of Justice, assigned to the New York Joint Strike Force Against Organized Crime and Racketeering for the Southern District of New York, and am in charge of the prosecution of this matter.

2. I make this affidavit in opposition to a motion by the New York Telephone Company to vacate that portion of this Court's Order of March 19, 1976 directing the Telephone Company to furnish facilities and technical assistance (including lease lines) in order to effectuate the installation of a pen register.

3. I have been informed by Special Agent Walter F. Smith of the FBI that the Telephone Company has refused to provide lease lines, which refusal has prevented this investigation from proceeding. The Telephone Company has advised that the FBI should string cables from the subject apartment to another location when a pen register device can be installed.

4. After conferring with Special Agent Smith, it has been concluded that such an operation is unfeasible, and would expose the Government's investigation of the illegal gambling operation. Agent Smith, after conducting surveillances, has advised that if men were observed stringing lines and cables from the subject apartment to another location, the gambling operation would cease to function.

5. Accordingly, based on this affidavit, the affidavit of Special Agent Smith, and the memorandum of law submitted herewith, the motion of the New York Telephone Company to vacate the Court's Order of March 19, 1976 should be denied.

Subscribed and sworn to before me
this 31st day of March, 1976

/s/ Peter D. Sudler
PETER D. SUDLER
Special Attorney
United States Department
of Justice

JACOB LAUFER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	*Affidavit* MISC. No. 19-97 (44) (CHT)

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

Walter F. Smith, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, assigned to the New York City Office, and am in charge of the investigation which is the subject matter of this motion. As such I am familiar with the facts alleged herein.

2. The Federal Bureau of Investigation is presently conducting an investigation into organized criminal activity focusing upon the operation of an illegal gambling business functioning within the Borough of Manhattan. This gambling syndicate operates through the use of a wire room located in an apartment wherein telephone lines are connected. The location of this apartment and the telephone numbers connected thereto are changed on approximately a bimonthly basis.

3. On March 19, 1976 an order authorizing the use of a pen register or similar mechanical device was signed by the Honorable Charles H. Tenney, United States District Judge. That order directed the New York Telephone Company to furnish forthwith "all information, facilities and technical assistance" necessary to comply with the Court's order.

4. On March 19, 1976 at approximately 2:00 p.m., the affiant proceeded directly from the chambers of Judge Charles H. Tenney to the offices of the New York Telephone Company and attempted to deliver a conformed copy of the

aforementioned order to Leonard Dudden, an employee of the Security Department of the New York Telephone Company, and serving as liason [sic] officer with the Federal Bureau of Investigation in matters requiring the cooperation or assistance of the telephone company. The affiant was informed by the lobby receptionist at the telephone company offices, 1095 Avenue of the Americas, New York, New York, that Leonard Dudden had left the premises and was not available.

5. On March 22, 1976, the affiant was informed by John E. Craig, a Special Agent of the FBI that Special Agent Craig had contacted Leonard Dudden on March 19, 1976 in regard to the leasing of telephone lines in order to suitably install pen registers on telephone instruments in an apartment located on 14th Street in the borough of Manhattan. Special Agent Craig advised the affiant that Leonard Dudden had refused the FBI's request to lease telephone lines on March 19, 1976.

6. From March 20, 1976 up to and including March 23, 1976, the affiant and other Special Agents of the FBI, assigned to this gambling investigation, canvassed the area of 14th Street, New York, New York, in the vicinity of the aforementioned subject apartment, in an attempt to locate a suitable location from which the monitoring of pen registers could be conducted without compromising the investigation. Inasmuch as the buildings immediately adjacent to the apartment building in which the gambling operation is located are abandoned and all windows and doors are sealed with sheet metal, and the fact that prior investigation and interception of wire communication of the operators of this gambling operation discloses that these operators employ countersurveillance techniques thereby precluding the installation of a pen register device or actual lines leading to a pen register device in another location.

7. On March 24, 1976, the affiant delivered a conformed copy of the aforementioned order to Leonard Dudden at 1095 Avenue of the Americas, New York, New York, the offices of the New York Telephone Company. Prior to examining the order, Dudden stated that the leasing of telephone lines in non-title three matters was prohibited by Telephone Company regulations and Dudden therefore refused to comply with the order. In the presence of the affiant,

Dudden gave the aforementioned copy of the order to John Whitman, the Security Manager of New York City-East for the New York Telephone Company. Whitman examined the conformed copy of the aforementioned order and stated that, in accordance with New York Telephone Company policy, he would refuse to comply with the order and therefore would not lease telephone lines to the FBI for this investigation. The affiant requested that this court order be brought to the attention of the legal department of the New York Telephone Company and Whitman stated that the order would be provided to the legal department but that it was also in accordance with instructions from the legal department, and that Whitman was refusing to comply with the order.

WHEREFORE, the affiant respectfully requests that the motion of the New York Telephone Company, seeking to vacate that portion of the Court's order of March 19, 1976 directing the telephone company to provide lease lines, be denied.

/s/ Walter F. Smith
WALTER F. SMITH
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn to
before me this 31st day
of March, 1976.

Jacob Laufer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	MOTION TO STAY MISC. No. 19-97 (44) (C.H.T.)

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court to stay the order of this Court issued on March 19, 1976, which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials pending its appeal from an order of the Court, dated April 2nd 1976, denying Telephone's Motion to Vacate or Modify said Order.

As grounds therefor Telephone respectfully represents that said Motion to Vacate or Modify the Order directing Telephone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled *Southern Bell* v. *United States*. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a legitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which had considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved

will have been irrevocably invaded. Their rights can only be protected and the intent of congress preserved by a stay *pendente lite.*

Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

In the alternative Telphone respectfully moves the Court to stay for such time as may be necessary in order for it to apply for a stay to the United States Court of Appeals, for the Second Circuit. The Clerk's office of the Court of Appeals for the Second Circuit advised Telephone that the next date for a hearing of a Motion to Stay is Tuesday, April 6, 1976. Telephone requests a stay until such time as the motion is heard and decided.

GEORGE E. ASHLEY
Attorney for
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, N.Y.

/s/ Frank R. Natoli
FRANK R. NATOLI
Of Counsel

Endorsement:
Motion denied
It is so ordered
Morris E Lasker
4/6/76 USDJ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	MOTION TO STAY

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court for a stay of the Order which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials issued by the United States District Court (SDNY) on March 19, 1976, Tenney, J., pending its appeal to this Court from the Order of Judge Tenney, dated April 2 and filed April 5, 1976, denying Telephone's Motion to Vacate or Modify the March 19, 1976 Order.

As grounds therefor Telephone respectfully represents that:

1. On March 19, 1976, an Order was issued by the United States District Court (SDNY), Tenney, J., directing Telephone to furnish information, facilities and technical assistance to law enforcement officials in connection with the installation and operation of a mechanical devise known as a pen register. A copy of this Order is appended hereto as Exhibit "A".

2. On March 24, 1976, Telephone was served with said Order by a Special Agent of the Federal Bureau of Investigation ("FBI"). Upon receipt of said Order Telephone's Security Office provided the Government Agents with appearance information, but refused to furnish lease lines since Telephone questioned the legal authority of the District Court to order Telephone to provide lease lines and technical assistance in a criminal investigation.

3. On March 25, 1976, Telephone's Legal Department contacted the office of WILLIAM I. ARONWALD, Esq., Attorney in Charge of the Joint Strike Force Against Organized Crime and Racketeers of the United States Department of

Justice and advised the Government that Telephone intended to move to vacate or modify the March 19, 1976 Order. On the following day, March 26, 1976, Telephone's counsel was again in contact with the Government's counsel. By mutual agreement with the Government, Telephone agreed to have its motion papers ready by the early part of the following week. On Monday, March 29, 1976, counsel for Telephone and the Government again had a discussion covering the forthcoming motion. On this date Telephone advised the Government that the Order to Show Cause would be presented on the following day.

4. On March 30, 1976, Telephone promptly filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 Order. Both parties submitted affidavits and memoranda of law on March 31, 1976. Telephone's supporting affidavits and memorandum of law are appended hereto and marked Exhibits "B" and "C". On April 5, 1976, Judge Tenney denied, in all respects, Telephone's motion to vacate or modify the Order. Hereto attached is a copy of that decision marked Exhibit "D".

5. At the time of filing the Order to Show Cause, application was made therein for a Stay pending Judge Tenney's decision. The Stay application was denied on March 30, 1976.

6. In view of the decision denying Telephone's motion, application is herein made to this Court for a Stay pending the appeal. Application to the District Court (Judge Tenney) for a Stay is *not* practicable since Judge Tenney is on vacation and will remain away the entire week. Further, in view of his previous denial for a Stay, it appears unlikely that one would be granted by the District Court. However, time is of the essence in this particular proceeding. It must be further noted that at the time of filing the Order to Show Cause, the Government opposed any Stay pending the decision. Accordingly, Telephone has no alternative but to make its application directly to the Second Circuit for a Stay pending its appeal. In the absence of J. Tenney, formal application for a stay was made to J. Lasker and said Stay was denied. On April 6, 1976, the Government also refused to consent to the Stay.

7. Telephone respectfully represents to this Court that said Motion to Vacate or Modify the Order directing Telephone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled *Southern Bell* v. *United States*. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

8. Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a ligitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which have considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved will have been irrevocably invaded. Their rights can only be protected and the intent of Congress preserved by a stay *pendente lite*.

9. It is important to note that should this motion to stay not be granted, Telephone and its employees face the real dilemma of choosing between civil and criminal liability. If the order directing Telephone's assistance is lawful, interference with its execution by Telephone or any of its employees might be considered contempt of court or a possible violation of 18 U.S.C. §§ 1509, 1510 concerning obstruction of justice. On the other hand, compliance with an invalid order will violate the privacy of telecommunications and subject Telephone and its employees to substantial civil liability under 18 U.S.C. § 2520 and 47 U.S.C. § 605. It is, therefore, important that the validity of the Court's order be determined by the Court of Appeals before Telephone is required to furnish such assistance.

10. Additionally, should this motion to stay not be granted, the pen register authorized by the Order will be completed upon expiration of the twenty day period and Telephone's right to appeal the final order could be denied by the issue presented becoming moot. It is a crucial matter that Telephone's rights, duties and obligations be deter-

mined in this case. To do otherwise will subject Telephone to a continuing pattern of utilization of this procedure by the Government without ever having the issues raised herein decided.

11. It must be emphasized that Telephone's motion to vacate the March 19, 1976 Order is supported by Telephone's deep concern to provide a public service within the guidelines mandated by Congress. It is Telephone's policy, as required by the Communications Act of 1934, to make every effort to ensure and to protect the privacy of telecommunications. In this nature Telephone serves as a public trustee with an extremely high degree of fiduciary duty. Since Congress has granted this protection to the public, it is Telephone's duty and obligation to contest those measures that unlawfully infringe upon it. This case indicates that federal agencies are disposed to continue seeking pen registers by non-Title III applications. It is obvious that the issues posed will continue to arise between the same parties. It is extremely important to the parties herein, as well as the public interest to have this Honorable Court resolve the questions presented. It is the deep concern of Telephone that the public be protected from potentially unwarranted Government intrusion of the privacy of telecommunications.

12. Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

GEORGE E. ASHLEY
Attorney for
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, New York

/s/ Frank R. Natoli
FRANK R. NATOLI
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	*Affidavit in Opposition to Motion for a Stay*

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

PETER D. SUDLER, being duly sworn, deposes and says:

1. I am a Special Attorney with the United States Department of Justice assigned to the New York Strike Force against Organized Crime and Racketeering for the Southern District of New York. I am the attorney in charge of the underlying investigation pursuant to which Judge Tenney issued the March 19, 1976 order authorizing the use of the pen register in question.

2. I make this affidavit in opposition to the motion for a stay of both Judge Tenney's orders of March 19, 1976 and April 2, 1976 directing the New York Telephone Company to furnish information, facilities, and technical assistance (including lease lines) necessary to enable agents of the Federal Bureau of Investigation to install pen registers on two telephones.

3. Aside from relying on the opinion of the District Court (attached hereto as Exhibit A), the government will rely upon its memorandum of law and accompanying affidavits (attached hereto as Exhibit B) submitted to the District Court in opposition to the Telephone Company's motion to vacate the March 19, 1976 order. The government will therefore not repeat, in this affidavit, arguments and recitations of fact made to the District Court which are contained in Exhibit B, but will confine itself to pertinent issues relating solely to the motion now before this Court for a stay.

4. On April 9, 1976, the March 19, 1976 order of the District Court authorizing the use of a pen register will expire.

Assuming that the telephone company's motion for a stay is denied by this Court, the government will then be in the position of having to again go before the District Court to apply for a new order authorizing the use of a pen register. Whether such an order would be granted i[s] a matter of conjecture. It is not known whether probable cause of a sufficiently updated nature would exist to justify a new order. It is not known whether the gambling operation being investigated will still be operating at the same location and over the same telephone lines as those specified in the March 19, 1976 order. It is significant that this gambling operation has a prior history of frequent changes of location and telephone numbers.

5. Accordingly, the government has already been, and will continue to be severely prejudiced, by the actions of the telephone company in refusing to obey the order of the District Court, even if this Court now denies the motion for a stay and eventually affirms Judge Tenney. There could be no better demonstration of the potential for frustration of legitimate law enforcement objectives than allowing the telephone company to pick and choose which Court orders it will obey and which it will not, than this case. By its actions here the telephone company has already brought to a complete halt an ongoing criminal investigation.

6. The most ironical aspect of this case, from the government's view, is the telephone company's position that the utilization of a pen register would result in an invasion of privacy. The device of a pen register, when installed, merely permits discovery of the number of other telephone installations dialed from the instrument to which it is attached. It should be noted that upon the issuance of a grand jury subpoena, the government can obtain toll records of all long distance calls made from any telephone installation. However where, as here, the telephone company does not keep Message Unit Detail service, the government is forced to utilize the pen register device in order to determine what telephones are being called within the Message Unit area. From a commonsense point of view the question may well be asked why, if the government can obtain long distance records by subpoena, should it be required that an order in the nature of a search warrant be obtained to gain access to local toll records? Although the question is probably ir-

relevant since the government here did obtain an order in the nature of a search warrant, thus satisfying all fourth amendment considerations, nevertheless it points out the frivolity of the telephone company's position that a pen register constitutes an invasion of privacy.

7. In conclusion, it is anticipated by the government, that the telephone company will argue that if the stay is denied and compliance with the District Court's order is made, the appeal will become moot. The government contends that if this Court were to deny this motion for a stay, appellate review of the District Court's decision would still be available under the theory that this situation is capable of repetition, yet would evade review. See *Roe* v. *Wade*, 410 U.S. 113 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

WHEREFORE, it is respectfully requested that the motion for a stay be denied.

/s/ Peter D. Sudler
PETER D. SUDLER
Special Attorney
U.S. Department of Justice

Subscribed and sworn to
before me this 7th day
of April, 1976.

Steven K. Frankel

76-1155
A 14

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and seventy-six.

In Re:

Application of the United States of America in the matter of an order authorizing the use of a pen register or similar mechanical device.

New York Telephone Company, ("Telephone",)

Appellant.

upon consideration of
It is hereby ordered that/the motion made herein by counsel for the

appellant ~~appellee~~ ~~intervenor~~ ~~respondent~~

by notice of motion ~~dated~~ filed April 6, 1976 for a stay pending appeal; for a preference that the motion for a stay

be and it hereby is ~~granted~~ denied and that the motion for a preference be and it hereby is granted.

It is further ordered that appellant shall file a brief and joint appendix on or before April 12, 1976; that the appellee shall file a brief on or before April 16, 1976; that the appeal shall be set for argument on Monday April 19, 1976 before the regular panel sitting and that all parties may file their papers in typewritten form.

A. DANIEL FUSARO
Clerk
by Edward J. Guardaro
Senior Deputy Clerk

BEFORE: HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

HON. WILLIAM H. MULLIGAN
Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE.	MISC. No. 19-97 (44)

ORDER

EXTENDING THE TIME FOR USE OF A PEN REGISTER

IT IS HEREBY ORDERED that the Order of the District Court (attached hereto as Exhibit A) is amended to extend the period of time for which utilization of the pen register may be made from twenty (20) days to forty (40) days, or upon attainment of the authorized objective, whichever occurs earlier.

Dated: April 9, 1976
New York, New York

/s/ MORRIS E. LASKER
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

No. 76-835

United States,

Petitioner,

v.

New York Telephone Company

ORDER ALLOWING CERTIORARI. Filed January 25, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ..... Circuit is granted.

☆ U.S. Government Printing Office: 1977—228-786/58

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-835

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

REPLY OF THE RESPONDENT TO THE PETITION OF THE SOLICITOR GENERAL ON BEHALF OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

For the reasons stated herein, Respondent New York Telephone Company believes the petition of the Solicitor General should be granted.

Respondent agrees that there is a conflict between the opinion of the Second Circuit below and that of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809 (1976), cited by the Government. In addition, on December 9, 1976, the Eighth Circuit (Judge Lay dissenting) also reached a contrary result from that of the Second Circuit in *United States* v. *Southwestern Bell Tel. Co.*, No. 76-1725. In the opinion of Respondent, a conflict also

exists between the opinions of the Seventh and Eighth Circuits and that of the Ninth Circuit in *Application of the United States*, 427 F.2d 639 (1970). Furthermore, there has been a wide difference of opinion among the individual judges who have considered the matter, as evidenced by the dissents in both the Second and Eighth Circuits, the conflicting views of the District Judges presented with the problem (see e.g., *In the Matter of the Application of United States of America for an Order Authorizing Use of a Pen Register Device*, 407 F.Supp. 398 (W.D. Mo., 1976)), and the different bases used by those judges who would sustain the Government's position.

In addition to the need to resolve this conflict, grant of the petition is warranted by the important public issues involved, which this Court should address. The sweeping and yet essentially undefined nature of the asserted power to order the Telephone Company to affirmatively assist in the ordered surveillance, and its implications for all citizens, make it a matter which justifies the exercise of this Court's supervisory powers, just as the Second Circuit felt it should exercise its comparable powers with respect to the courts within its jurisdiction. These cases also involve the fundamental question of whether the district courts have the authority to authorize the use of a pen register, with its inherent full wiretap capability•, outside of the Congressionally-mandated safeguards of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510, *et seq.*) (hereinafter referred to as Title III). In this respect, the question as formulated by the Solicitor General is too narrow and somewhat inaccurately drawn. The orders of the District Courts are not "admittedly valid." In the Court below, Respondent contended that "It is doubtful that the District Court has the authority to issue an order authorizing law enforcement to utilize a pen register except pursuant to the provisions of Title III." The Court below addressed this issue (as did the Seventh and Eighth

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• See footnote p. 5, *infra*.

Circuits) and found a district court has this authority. However, such authority was questioned by Judge Lay in his dissenting opinion in the Eighth Circuit case, *United States* v. *Southwestern Bell Tel. Co., supra,* and was denied by Judge Oliver of the Western District of Missouri in *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra.*

Congress and the courts have wrestled for decades with the problem of balancing the need to protect the privacy of communications with the need for effective law enforcement. In 1968 Congress passed a comprehensive act in an attempt to strike a satisfactory balance. The Government, if it had chosen to do so, could have obtained authorization for the installation of the pen register at issue pursuant to the provisions of Title III of that Act (C.A. App. 12). It stretches credibility to believe that Congress, in enacting the elaborate safeguards of Title III, intended to allow the Government to proceed as here with the inherent capability for abuse thus entailed. The question of the power or propriety of the issuance of the order to the Telephone Company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, and this Court should not do so without full consideration.

For the reasons set forth above, Respondent, while agreeing to the Solicitor General's statement of "Opinions Below" and "Jurisdiction" believes that the "Question Presented," "Statute[s] and Rule[s] Involved" and "Statement" should be expanded and clarified.

Question Presented

Whether a United States District Court has the authority, when the requirements of Title III have not been complied with, (1) to authorize the installation of a pen register for the surveillance of a telephone line by law enforcement officials, and (2) to order a telephone company to provide affirmative assistance in carrying out such surveillance.

Statutes and Rules Involved

The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Rule 41, Fed. R. Crim. P.

> (b) Grounds for Issuance. A warrant may be issued under this title to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

18 U.S.C. 2510, *et seq.*

Because of its length, Title III is attached hereto as an Appendix.

Statement

On March 19, 1976, an Order was issued by the United States District Court (S.D.N.Y.), Tenney, J., directing Respondent and its employees to furnish information, facili-

ties and technical assistance to Federal law-enforcement officials in connection with the installation and operation of a pen register.* The Order was not issued pursuant to the provisions of Title III.

Respondent declined to furnish lease lines or technical assistance pending further judicial consideration since Respondent questioned the legal authority of the District Court to issue said order outside of the provisions of Title III. On March 30, 1976, Respondent filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 order. The district court denied Respondent's motion and Respondent immediately appealed to the Circuit Court of Appeals for the Second Circuit. That court refused to vacate the district court's order, but authorized an appeal on an expedited basis.

The Court of Appeals reversed that portion of the district court's order directing Respondent to provide facili-

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* The Solicitor General as Footnote 1 on page 3 of his petition quotes a description of a pen register from the majority opinion of Judge Medina in the court below. This quote, while accurate as far as it goes, does not describe the full capabilities of a modern pen register. As the Court of Appeals for the Fifth Circuit pointed out after a similar description of a pen register:

> "Notwithstanding the apparent sterility of a pen register implied by this definition, the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit. In *Re Joyce*, 506 F.2d 373 at 377 (1975)."

To the same effect is Judge Lay's statement in his dissenting opinion in *United States* v. *Southwestern Bell Telephone Co.* (8th Cir.) No. 76-1725:

> "It is conceded by the parties that such surveillance [pen register] can be abused and that private conversations on touch-tone telephones can be intercepted." p. 17.

The affidavit of F. Natoli in the District Court in this case affirms that, once the lines are provided for the installation of a pen register, the Government possesses "full capability of wiretapping." (C.A. App. 13)

ties and technical assistance. In its opinion, the court first addressed the issue of whether the district court had authority to authorize surveillance of a telephone line through the use of a pen register, outside of the statutory provisions of Title III. The court found that the district court had such authority, agreeing with the rationale of *United States* v. *Illinois Bell Tel. Co., supra,* that the authority to issue such an order outside of Title III could be found either in the inherent power of the district court or by analogy to Rule 41 F.R. Cr. P. In so doing, however, the court recognized that Rule 41 was not directly applicable:

> "While the electronic impulses recorded by pen registers are not 'property' in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of nontangible property. But see In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, 407 F.Supp. 398 (W.D. Mo. 1976)."* (P. App. 7-8a)

The Court next addressed the issue of whether the district court could properly order Respondent to provide technical assistance and facilities to federal law enforcement agents in placing and operating a pen register outside of the provisions of Title III. The Court stated:

> "This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding

* In the cited case, the Federal District Court for the Western District of Missouri held, contrary to the majority's decision here, that Rule 41 was clearly not applicable and that a district court had no inherent authority outside of the provisions of Title III to authorize federal authorities to use a pen register. As stated previously, such authority was also questioned by Judge Lay, dissenting, in *United States* v. *Southwestern Bell Tel. Co., supra.*

> the power of a federal court to mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction." (*id.* p. 9a.)

It held that:

> ". . . in the absence of specific and properly limited congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." (*id.* p. 13a.)

The Court agreed with the statement of the Ninth Circuit in *Application of the United States,* 427 F.2d 639 (1970) that:

> "If the government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress." *Application of the United States, supra* at 644.*

The majority expressly rejected the reasoning of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co., supra,* that the quick action of Congress in amending Title III after the Ninth Circuit decision in *Application of the United States, supra,* indicated an assumption by Congress that district courts inherently had the power to require affirmative assistance:

> "On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by

* In this case, decided prior to the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 and 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order, the government had urged that a district court had inherent authority to require a telephone company to provide such assistance in placing a Title III order. The Ninth Circuit rejected that argument holding that, absent express statutory authorization, a Federal District Court was without power to compel technical cooperation by a Telephone Company in the interception of wire communications.

the Congress was due to a doubt that the courts possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorizations should be required in connection with pen register orders, especially as the two are so often issued in tandem." (P. App. p. 15a.)

The Court then went on to express its concern that a finding of inherent authority in a district court to order such affirmative assistance, without any concrete statutory guidelines, was dangerous to the rights of private third parties who might be directed to aid the government in its law enforcement endeavors. The Court stated:

> "Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step." (*id.* p. 15a.)

Realizing the potential danger inherent in holding that a district court can direct third parties to affirmatively assist law enforcement without any statutory basis or guidelines and mindful of the dangerous precedent for future orders

directed to third parties, the Court refused to "take the first step" and hold that the district court had either inherent authority or authority under the All Writs Act to compel Respondent's affirmative assistance in this case.

Reasons for Granting the Writ

I

As set forth in the Preliminary Statement, Respondent concurs that the petition of the Solicitor General should be granted. It does so because of the contrary holdings between courts of appeals for four circuits on the important issue of whether a district court has the inherent authority, without express statutory authorization, to order an unwilling private citizen to assist Government agents in placing a pen register for the surveillance of the telephone lines of potential criminal suspects. The court below and the Ninth Circuit* have respectively held that a district court has no such authority without express Congressional authorization. Respondent believes these decisions are correct and that the Seventh and Eighth Circuits clearly have erred, and established a dangerous precedent, through their respective contrary decisions.**

It is clear that if a district court has this inherent authority to compel Respondent to affirmatively assist law enforcement, it would also have the same authority over other private persons as well. This was so recognized by the court below and by the strong dissent of Judge Lay in *United States* v. *Southwestern Bell Telephone Company, supra.* As Judge Lay stated:

> "The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to

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* *Application of United States, supra.*

** *United States* v. *Illinois Bell Tel. Co., supra; United States* v. *Southwestern Bell Tel. Co., supra.* (Judge Lay dissenting.)

assist the Government in the invidious act of electronic surveillance should be based on definite authority." p. 16.

There is no warrant for making any distinction between a telephone company and other private parties. When Congress amended Title III to provide for orders of assistance to law enforcement agencies, following the Ninth Circuit opinion referred to above, it provided that such order could be directed to "a communication common carrier, landlord, custodian or other person" (18 U.S.C. § 2518(4)). Common carriers are to be treated no differently than other citizens except insofar as valid statutes prescribe otherwise.

There even appears to be a difference between the Seventh and Eighth Circuits as to the source of this unprecedented claim of authority over a private party. The Seventh Circuit relies on the All Writs Act to supply the necessary authority. The Eighth Circuit, while mentioning the All Writs Act in a footnote, relies instead on the "inherent" authority of a district court. In both cases, the rationale is defective.

As Judge Lay aptly points out with respect to the All Writs Act:

> "It is axiomatic that the All Writs Act does not provide an independent federal jurisdictional base, but can only be used in aid of the court's jurisdiction." p. 11.

The language quoted from Judge Lay's opinion has consistently been the holding of those courts which have ruled on this issue. *United States* v. *First Fed. S. & L. Ass'n*, 248 F.2d 804, 808-09 (7th Cir. 1957), cert. denied, 355 U.S. 957 (1958); *Brittingham* v. *United States Commissioner of Internal Revenue*, 451 F.2d 315 (5th Cir. 1971).

The fact that the use of the All Writs Act is unprecedented under these circumstances was also recognized by Judge Mansfield in his dissent below:

> "It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co.*, *supra*, the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant." (P. App. p. 19a)

The Eighth Circuit's claim of "inherent authority" to require the affirmative assistance of a third party is also unprecedented. The Ninth Circuit in *Application of the United States, supra*, expressly rejected this claim of inherent authority:

> "We are not convinced that the authority which the Government would have the court exercise to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a *posse comitatus* to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory or inherent, for entry of such an order." (427 F.2d at p. 644.)

As the court below found, the subsequent action of Congress in passing the 1970 amendments to the All Writs Act did not overrule, but acted upon, the holding of the Ninth Circuit quoted above (P. App., p. 15a). Also denying any "inherent power" is Judge Oliver's opinion in *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra,* and Judge Lay's dissenting opinion in *United States* v. *Southwestern Bell Tel. Co., supra.* With respect to this basis for claiming authority, Judge Lay said:

> "To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by

conjuring up some convenient, mystical authority through the pseudonym of 'inherent power.'" p. 17.

Given the split in the holding and rationale of the Circuits, as well as the importance of the issue involved, Respondent believes that *certiorari* should be granted.

II

In reaching the issue of a district court's authority to direct affirmative assistance on the part of an unwilling third party in placing a pen register, the court below and the Seventh and Eighth Circuits first had to conclude that a district court had the authority to authorize the use of a pen register outside of the statutory safeguards contained in Title III. While each of these courts decided that a district court did have such authority, it is not clear that they did so on a consistent rationale and in the Eighth Circuit the conclusion was reached over the strong dissent of Judge Lay.

This aspect of the case, as well as the ultimate issue of a district court's authority to order affirmative assistance from third parties, currently is pending before the Sixth Circuit.* Southwestern Bell in the Eighth Circuit on December 23 petitioned for rehearing *en banc*.

Furthermore, the District Court for the Western District of Missouri held that a district court has no authority outside of the provisions of Title III to authorize the use of a pen register, a decision which the Government did not

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* In the *Matter of the Application of Ohio Bell Telephone Company*, No. USDJ 26 N.D. Ohio, not yet docketed. A Fifth Circuit case referred to in footnote 7 of the Solicitor General's Petition, *In Re Application*, No. 76-4117 has been mooted by mutual consent. However, in *Southern Bell Tel. Co.* v. *United States*, Nos. 74-3357, 74-3358 (1976), the Fifth Circuit, in holding that two earlier cases involving the same issues presented here were moot, directed that any future case be referred immediately to it for decision. Thus, it is highly probable that the Fifth Circuit will be presented with the identical issues in the near future.

appeal. See *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device, supra.*

The grant of the basic authority to use a pen register for law enforcement outside the constraints of Title III is not "admittedly valid," and the question of the power or propriety of the issuance of the Order to the telephone company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, something this Court has never done.

As the Fifth Circuit found in the case of *In Re Joyce, supra*, once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit. If a district court may authorize the use of a pen register, with its inherent capacity for wiretapping, simply by satisfying a nebulous Fourth Amendment requirement, then, as the District Court for the Western District of Missouri stated, district courts would:

> ". . . have power and jurisdiction to authorize the use of pen register devices in connection with *any* investigation of *any* violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III." (407 F. Supp. 398 (1976) p. 403.)

Logically, if a federal district court has this authority outside of the statutory safeguards contained in Title III, so does any state court, whether or not the particular state has enacted the enabling state wiretap legislation contemplated by Title III. Respondent respectfully submits that a review of the state of the law prior to the enactment of Title III, and Congress's stated intent in enacting Title III, clearly lead to the conclusion that Congress never intended to authorize the use of pen registers by law enforcement, with their inherent capability of abuse, outside of the stringent statutory safeguards contained in Title III.

On the other hand, the Government has a clear and satisfactory remedy. It is not stymied. An order authorizing the use of a pen register may be obtained pursuant to the provisions of Title III. Indeed the Government has done so on numerous occasions. See, e.g., *United States* v. *Finn*, 502 F.2d 938 (7th Cir. 1974), *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974), *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974), cert. denied 420 U.S. 955 (1975).*

It also is clear that prior to the enactment of Title III, § 605 of the Communications Act of 1934 (47 U.S.C. 605), which prohibited all interception of telephone conversations by law enforcemnt officers, also prohibited the use of a pen register, since such use would reveal the existence of a telephone call. See *Benanti* v. *United States*, 355 U.S. 96, 2 L.Ed. 2nd 126 (1957). As the court stated in *United States* v. *Guglielmo*, 245 F. Supp. 534 (1965):

> "It is obvious from the facts that the instant unconsented use of a pen register violated the integrity of telephone communications and the clear prohibition of § 605 . . . *Nardone* v. *U.S.*, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307." p. 536.

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* In this connection, the argument of the Government on page 11 of the petition is quite revealing. It objects to the "added procedural burdens on the government and the courts in complying with the complex requirements of Title III." But those "complex requirements" were imposed by Congress to make certain that a proper balance was maintained between the rights of private citizens to be free from unnecessarily broad and frequent invasions of their privacy and the legitimate needs of law enforcement. The Government—and this is the nub of the matter—should not be permitted to do an "end run" around Title III. The additional argument made by the Government (p. 11) that if pen registers are not authorized it will be forced to secure authority for broader invasions of privacy (i.e., wiretaps) is, of course, a *non sequitur*. The law enforcement agency need only apply for the authority to install a pen register if that is all it requires, and the Attorney General or his designated assistant need only authorize such if, in their judgment, no broader invasion of privacy is warranted.

This also was the holding of *U.S.* v. *Caplan*, 255 F.Supp. 805 (1966) and *U.S.* v. *Dote*, 371 F.2d 176 (7th Cir. 1966). Thus, prior to the enactment of Title III in 1968, the use of a pen register by law enforcement officials was prohibited by § 605 on the ground that it was an "interception which revealed the existence of a telephone call."

In enacting Title III, the Congreess set forth its intent as follows:

> "(b) In order to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.
>
> "(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication had consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused." (§ 801)

Congress, in enacting Title III, obviously intended to legislate comprehensively and preemptively in the area of "the interception of wire and oral communications." As set forth above, prior to the enactment of Title III, the use of a pen register was considered the *interception* of a telephone conversation. This court in *United States* v. *Gior-*

dano, 416 U.S. 505 (1974) interpreted Congress's intent as follows:

> "The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorized wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." (416 U.S., p. 515)

Thus Congress's intent, as expressed in the Congressional findings and as interpreted by this court, is to have Title III govern all interceptions of telephone conversations. This expressed intent, coupled with the fact that the use of a pen register was regarded by the courts as an "interception" prior to the enactment of Title III, makes it difficult to believe that Congress intended to authorize law enforcement to use pen registers, with their inherent capabilities for wiretapping, except pursuant to, or in conjunction with, a Title III order.

The various circuits, in concluding that orders authorizing a pen register may be issued outside of the strict controls of Title III, base their conclusion on (1) the definition of "intercept" contained in the statute, (2) a passing reference to pen registers in the legislative history, and (3) a statement of Mr. Justice Powell in his concurring and dissenting decision in *United States* v. *Giordano, supra*, which referred to pen registers.

Respondent respectfully submits that the grounds relied upon for concluding that pen registers are not covered by Title III are not convincing when compared to the legislative intent set forth above. The first, and perhaps the strongest, ground cited is the definition of "intercept" contained in the Act. 18 U.S.C. § 2510(4) provides:

> "(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

The circuit courts below reasoned that the inclusion of the word "aural" requires that the contents of the conversation actually be overheard before an "intercept" takes place. Respondent submits that this is not controlling when the Act is examined as a whole. As stated previously, the use of a pen register was considered an "interception" prior to the enactment of Title III. Congress, in its statement of legislative intent quoted above, indicated that Title III was to govern all interceptions. Without a clearer expression of Congressional intent than the use of the word "aural," it is extremely doubtful that Congress meant to exclude pen registers, particularly in view of the law governing pen registers at the time Title III was enacted. It is hard to believe that Congress through the use of this one word meant to emasculate the prohibition against the disclosure of the *existence* of a telephone call previously afforded by § 605.

The courts below also rely on the following cryptic statement from the legislative history of Title III:

> "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register', for example, would be permissible. But see *U.S.* v. *Dote*, 371 F.2d 176 (7th Cir. 1966)." S. Rep. No. 1097 90th Cong. 2nd Sess., 90 (1968)

A reading of *U.S.* v. *Dote*, casts doubt that this language indicated Congress intended law enforcement officials to be able to obtain authorization for the use of pen registers outside of Title III.

In *Dote*, a telephone company informed the Internal Revenue Service that it suspected a certain telephone was being used for bookmaking and, at the request of the IRS,

installed a pen register. The company turned over to the IRS the results of the pen register without having been served with a subpoena or other judicial process. The Court held that, while pen registers serve an important function in telephone company internal operations, and, therefore, their use was permissible, the release of the pen register results in that case without a subpoena was a violation of § 605 of the Communications Act (47 U.S.C. § 605). Thus, the statement in the legislative history that a pen register would be permissible, with the warning that the holding of *Dote* should be noted, would indicate that Congress was aware telephone companies used pen registers in the ordinary course of business, and recognized that they could continue to do so, as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case. Such an interpretation is clearly more consistent with the overall thrust of Title III than one that implies that Congress intended to authorize law enforcement agencies to use pen registers for investigative purposes outside of the strict requirements set forth in Title III.

The last item relied on by the courts below is the statement, clearly a dictum, of Mr. Justice Powell in *United States* v. *Giordano, supra,* in which he stated:

> "Because a pen register is not subject to the provisions of Title III the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." (416 U.S., pp. 553-554)

With all due respect to Justice Powell this dictum (since the authorization of a pen register outside of Title III was not at issue), should not be persuasive, particularly in view of the Congressional intent as set forth above, and especially now that pen registers demonstrably have full wiretap capability, a fact of which the honorable justice may not have been apprised.

Respondent submits that at best it is unclear whether Congress, by the enactment of Title III, intended to exclude the use of pen registers by law enforcement from its provisions. Given the fact that a pen register clearly reveals the existence of a call, which was prohibited prior to the enactment of Title III, and given the great potential for abuse by turning a pen register into a full scale wiretap simply by plugging in a set of head phones,* Respondent believes that Congress did not intend to exempt pen registers from the safeguards of Title III when used for law enforcement purposes.

Conclusion

For the reasons set forth herein, Respondent submits that the Petition for Certiorari should be granted and this court should determine not only whether a district court can direct an unwilling third party to affirmatively assist in placing a pen register, but also whether a district court may authorize the use of a pen register outside of the statutory safeguards contained in Title III inasmuch as that is the necessary foundation for exercise of the alleged ancillary authority to direct assistance.

Respectfully submitted,

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* In calling the Court's attention to the potential for abuse, we do not mean to ourselves make any accusation of lack of good faith or misconduct against law enforcement officials. We only want to assure that the Court has full knowledge of the facts. Congress was unwilling to grant authority for wiretapping except in the limited circumstances and under the strict safeguards set forth in Title III, and yet a clear potential for circumvention exists if pen register and leased facility orders can be secured outside it. As Madison wrote in The Federalist, "If angels were to govern men, neither external nor internal controls would be necessary." James Madison, The Federalist No. 51 (1788).

APPENDIX

"Title III"

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or randum monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforce-

ment officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to

obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications,

and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or

manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions

on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper

performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the

contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or ar · leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

[*See main volume for text of (a) to (c)*]

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer

than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8). (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal

provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

No. 76-835

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK TELEPHONE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 538 F. 2d 956. The opinion of the district court (Pet. App. E) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on July 13, 1976. A petition for rehearing with suggestion for rehearing *en banc* was denied on October 26, 1976 (Pet. Apps. C and D). The petition for a writ of certiorari was filed on December 20, 1976, and was granted on January 25, 1977 (App. 34). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, as part of its admittedly valid order authorizing the use of a pen register to investigate gambling offenses being committed by means of the telephone, a United States District Court may properly direct the telephone company to provide federal law enforcement agents the facilities and technical assistance necessary for implementation of the court's order.

STATUTES AND RULES INVOLVED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, provides in pertinent part:[1]

18 U.S.C. 2510.

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

* * * * *

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

* * * * *

[1] The entire text of Title III is set forth in the Appendix to Respondent's reply to our petition for certiorari, pp. 1a–25a.

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

* * * * *

The All Writs Act, 28 U.S.C. 1651(a) provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

47 U.S.C. 201(a) provides, in pertinent part:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request there * * *.

Rule 41, Federal Rules of Criminal Procedure, provides in pertinent part:

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *Property Which May Be Seized With a Warrant.* A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits

of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

* * * * *

(h) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

Rule 57(b), Federal Rules of Criminal Procedure, provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

New York Public Service Law, Section 91 (McKinney 1955) provides, in pertinent part:

> *Adequate service; just and reasonable charges; unjust discrimination; unreasonable preference*
>
> 1. Every telegraph corporation and every telephone corporation shall furnish and provide

> with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. * * *

STATEMENT

On March 19, 1976, Judge Tenney of the United States District Court for the Southern District of New York issued an order authorizing FBI agents to install and use "pen registers" with respect to two telephones (App. 6–7). A pen register is a mechanical device that records the numbers dialed on a telephone (Pet. App. 1a–2a). In one version, the device operates by passing a narrow paper tape through a recording mechanism when the telephone receiver is removed from the hook. The recording mechanism consists of a pen that records on the paper tape the electrical impulses caused when the dial on the telephone is released.[2]

Pen registers must be attached, directly or indirectly, to the telephone line that services the subscriber's telephone. While most pen registers indicate the ringing of incoming calls, they do not identify the telephone number from which the calls originated (App. 15). None of the pen register devices[3] can

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[2] For example, if the numbers "345" were dialed, the pen register would record the following on the tape: "--- ---- -----." The dialed number is ascertained by counting the number of dashes in each group (App. 15). Although such pen registers are still in use, more modern versions of the devices automatically translate the dial impulses into numbers.

[3] Touch-tone decoders, which are similar to pen registers, are used for telephones having touch-tone dialing systems. Jones, *Electronic Eavesdropping Techniques and Equipment*, p. 31 (Law Enforcement Assistance Administration 1975).

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overhear oral communications and none can indicate whether outgoing calls are actually completed. Their only function is to provide a record of all numbers dialed from a particular telephone. Pen registers are manufactured mainly for telephone companies, which apparently use them to ensure the accuracy of billing to subscribers, to determine whether annoying calls to a subscriber are originating from a certain number and for other purposes.[4]

Judge Tenney issued his order of March 19, 1976, on the basis of an affidavit submitted on the same day by FBI Special Agent Smith (App. 1–5). This stated that certain individuals and unknown others were conducting an illegal gambling enterprise at 220 East 14th Street in New York and that two telephones bearing different numbers, which the affidavit listed, were being used at that address in the illegal activity (*id.* at 1). An investigation begun earlier, which included physical surveillance and a court-ordered wiretap, revealed that certain of these same individuals had been conducting an illegal gambling operation at another address in New York (*id.* at 1–3). A reliable informant notified the FBI that on March 16, 1976, this operation, which had been receiving an average of $19,000 per day in gambling wagers (*id.* at 2–4), had been moved to 220 East 14th

[4] Jones, *supra*, note 3; Note, *The Legal Constraints Upon the Use of the Pen Register As a Law Enforcement Tool*, 60 Cornell L. Rev. 1028, 1029 (1975); Claerhunt, *The Pen Register*, 20 Drake L. Rev. 108, 110–111 (1970); see also *United States* v. *Dote*, 371 F. 2d 176 (C.A. 7).

Street and was being conducted with one of the two telephone numbers mentioned above (p. 6, *supra*). The New York Telephone Company, which is a wholly-owned subsidiary of AT&T,[5] advised the FBI that this number and the other were subscribed to by "T. Hamilton" (*id.* at 4).

Judge Tenney found that there was probable cause to believe that an unlawful gambling enterprise using the facilities of interstate commerce, in violation of 18 U.S.C. 1952 and 371, was being conducted at the East 14th Street address and that the two telephones subscribed to by T. Hamilton at that address were being used in the commission of those offenses (*id.* at 6). He therefore ordered the New York Telephone Company to furnish the FBI "all information, facilities, and technical assistance" needed to install unobtrusively the pen registers, which the FBI would supply (App. 7).[6] The FBI was ordered to compensate the company at the prevailing rate for all facilities and technical assistance the company supplied (*ibid.*). The court's order further authorized the FBI to operate the devices with respect to the two telephones until knowledge of the numbers called led to the identity of the associates and confederates of

[5] Moody's *Public Utility Manual*, p. 1904 (1976).

[6] The only "technical assistance" required of the telephone company is the making of any connections needed to create the leased line running from the subscriber's line to a location where the pen register can be attached and observed. The FBI supplies its own pen register and connects it to the leased line; the physical connection between the leased line and the suspect's line is also accomplished by the FBI.

those known to be conducting the illegal operation, or for twenty days, "whichever is earlier" (*ibid.*).

In response to the court's order, the company informed the FBI of the location where the lines from the telephones emerged from the sealed telephone cables (App. 16).[7] In order to install a pen register, this information is needed, as is the identity of the specific pair of wires that constitute the telephone circuit of the subject line (*ibid.*).[8] The company also agreed to identify such "pairs" (*ibid.*).

In order to attach the pen register in an inconspicuous location, away from the building containing the telephones, it may be necessary to employ a "leased line," which is an unused telephone line that makes an "appearance" (see note 7, *supra*) in the same terminal box as the suspect's telephone line. Inside the box the leased line can be connected to the subject line and the pen register can then be installed on the leased line at a remote location and observed from that point (App. 16).

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[7] Such locations, which may be in such places as the basement of an apartment house, a telephone pole or the rear wall of a building, are commonly called "appearances" (App. 16).

[8] The company retains information regarding such "pairs" and "appearances" in its normal business records and routinely discloses it to the government in response to subpoena or court order. 2 Hearings of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, p. 1569 (1976) (testimony of H. W. William Caming, attorney, American Telephone & Telegraph Company). The National Wiretap Commission (NWC), as it is commonly known, was established by Congress to study and review the operation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

In this case, however, the company refused to lease lines to the FBI, although the company interpreted the court's order to require it to do so (App. 16–17). Instead, the company "advised that the FBI should string cables from the subject apartment to another location [where] a pen register device can be installed" (App. 18).

In order to determine whether the investigation could be conducted without leased lines, FBI agents canvassed the neighborhood for four days in an attempt to find a location where it could string its own wires and attach the pen registers without alerting the suspects. However, because of the location of the apartment and because the suspects were known to use counter-surveillance techniques (App. 21), the FBI determined that "if men were observed stringing lines and cables from the subject apartment to another location, the gambling operation would cease to function" (App. 18). Leased lines were therefore essential.

On March 30, 1976, the telephone company moved the district court to vacate that portion of the pen register order directing it to furnish facilities and technical assistance to the FBI (App. 8). Although not directly challenging the government's authority to use a pen register (Pet. App. 31a), the Company claimed that it could be directed to provide the FBI with a leased line only in connection with a wiretap order issued under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18

U.S.C. 2510–2520) (Pet. App. 35a). The district court rejected this argument, pointing out that Title III regulates wire interceptions and not pen registers (*id.* at 32a–36a). Agreeing with the decision in *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (C.A. 7), the court concluded that it had authority to compel the telephone company to provide facilities and technical assistance to facilitate installation of a pen register (Pet. App. 37a–39a).

On April 9, 1976, after the district court and the court of appeals refused the telephone company's motions to stay the pen register order pending appeal of the denial of the motion to vacate (App. 24, 32), the company provided leased lines. On the same date, District Judge Lasker extended Judge Tenney's order of March 19 for an additional twenty days (App. 33).[9]

[9] Thus, the pen register investigation had been completed by the time of the court of appeals' decision in this case (July 13, 1976) and neither that decision nor a decision by this Court could affect this particular investigation. Nevertheless, this fact does not render the case moot, because the controversy here is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. The mootness question is discussed in our petition (pp. 6, n. 6, 17–20), upon which we rely. We add only that the telephone company has taken a stance that renders inevitable the recurrence of the questions in this case. On April 30, 1975, AT&T communicated "to all Bell System security managers and also security counsel * * * the recommendation that private-line [leased line] facilities not be furnished to federal law enforcement authorities acting under non-Title III court orders, for use in connection with a court-authorized pen register." Testimony of H. W. William Caming, Attorney, AT&T, 2 NWC Hearings, *supra*, at 1569.

The court of appeals affirmed in part and reversed in part, with one judge dissenting on the ground that the order below should be affirmed in its entirety (Pet. App. 1a–24a). The court agreed that pen registers do not fall within the scope of Title III and are not otherwise prohibited or regulated by statute. Relying in part on *United States* v. *Giordano,* 416 U.S. 505, 553–554 (Mr. Justice Powell, concurring in part and dissenting in part), the court further agreed that district courts have the power—either inherently or under Rule 41, Fed. R. Crim. P.—to authorize pen register surveillance. Because the order here was issued upon an adequate showing of probable cause, the court concluded that the district judge had properly authorized the FBI to install and use the devices (Pet. App. 3a–8a).

The majority held, however, that the district court abused its discretion in ordering respondent to lease lines to the FBI for installing the pen registers.[10] The majority assumed *arguendo* "that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company"; but "in the

[10] Although the decision below is phrased in terms of an abuse of discretion by the lower court, the basis for that finding does not lie in any particular facts of this case—indeed, the opinion specifically recognizes that the facts here strongly support the exercise of discretion. Instead, the majority in substance concluded that it will always be an abuse of judicial discretion to require the telephone company to provide a leased line for the installation of a pen register, so long as there is no statute expressly authorizing such assistance.

absence of specific and properly limited Congressional action, it was an abuse of discretion" for the district court to order the company to provide facilities or assistance (*id.* at 13a).

Although reaching this conclusion, the majority recognized (*id.* at 13a–14a):

> Federal law enforcement agents simply cannot implement pen register surveillance without the Telephone Company's help. The assistance requested required no extraordinary expenditure of time or effort by [respondent]; indeed, as we understand it, providing lease or private lines is a relatively simple, routine procedure. Moreover, as we have noted above, we believe that the Telephone Company can provide this technical assistance without fear of civil or criminal liability; and the order itself provides for financial compensation for [respondent] for the assistance it renders. An additional argument in favor of granting the Government's request is its legitimate concern that if the courts do not act to compel compliance, law enforcement in general, and the particular investigation involved here, may be severely hampered.

On the other hand, the majority believed that issuance of "such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (*id.* at 15a). On this basis, and the court's further concern that "there is no assurance that the court will always be able to protect * * * third parties from excessive or overzealous Government activity or compulsion," the court majority concluded

that Congress was better equipped than the judiciary to decide the circumstances under which the telephone company should be required to render assistance and facilities necessary for implementation of a pen register order (*id.* at 15a–16a).

In dissent, Judge Mansfield agreed with the majority's assumption that the district court possessed the power to require respondent to assist in implementing the order, but disagreed that such orders constitute an abuse of discretion in the absence of explicit statutory authorization. "[S]ince the terms, conditions and limits of such assistance would vary according to the circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint" (Pet. App. 24a). In Judge Mansfield's view, district courts could be trusted to use their powers only when necesary and the instant case was one in which the lower court appropriately ordered the telephone company's assistance (*id.* at 22a–23a).[11]

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[11] Two courts of appeals have ruled on the question in this case favorably to the government. *United States* v. *Southwestern Bell Telephone Company*, 546 F. 2d 243 (C.A. 8), petition for a writ of certiorari pending, No. 76–1157; *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809 (C.A. 7). The question is presently pending in the Sixth Circuit. *Ohio Bell Telephone Company* v. *United States*, No. 76–2627. The Fifth Circuit has dismissed one such case as moot (*Southern Bell Tel. & Tel. Co.* v. *United States*, 541 F. 2d 1151), and has a second case pending (*In re Application*, No. 76–4117) that is probably also moot under the rationale of *Southern Bell* because the individual under investigation has been arrested.

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SUMMARY OF ARGUMENT

Although respondent contends (Reply to Pet. 12–19) that pen register orders are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, it did not file a cross-petition for a writ of certiorari from the contrary holding below. Nevertheless, we do not believe that such a petition was required in the circumstances of this case, and we agree that the issue warrants review because it is so intimately related to the question set forth in the petition—whether the district court properly required the telephone company to furnish technical assistance necessary for the installation of the pen registers.

The language of Title III and its legislative history clearly indicate that Congress intended to permit the use of pen register surveillance as a normal investigatory technique free of the restrictions on the interception of oral communications contained in Title III. All courts of appeals to consider this issue have so held.

The order authorizing the use of the pen registers satisfied the Fourth Amendment, and thus was properly issued under Rule 41, Fed. R. Crim. P., governing the granting of search warrants. Since without the telephone company's assistance in installing the pen registers, that order would have no effect, the district court had power pursuant to the All Writs Act, 28 U.S.C. 1651(a), to require the necessary assistance.

Respondent is a public utility, under an obligation to provide its services on reasonable request. The

order here was issued on the basis of an undisputed finding of probable cause. It required the company to provide routine services, for which it was paid at prevailing rates, in order to investigate crimes being committed through the use of telephone company facilities. The district court's order was thus entirely reasonable and "agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

The district court did not abuse its discretion in issuing the order in the absence of specific statutory authorization. Congress has already provided strict sanctions against the unauthorized use of wiretaps, and those sanctions would deter the transformation of the authorized pen register surveillance into an unauthorized wiretap. Since the necessity for an order requiring the telephone company to assist in installing a pen register and the proper terms of such an order turn on the facts of the particular case, the matter is appropriately one for the exercise of judicial discretion, rather than statutory authorization. But even if statutory treatment were preferable, there would be no reason for a court to refuse to act in an appropriate case in the absence of a statute. Finally, the amendment of Title III to include a specific provision authorizing orders requiring telephone company assistance in installing wiretaps does not indicate that a similar statutory provision is necessary before a court may require the telephone company to assist in installing pen registers, which are governed by no similarly comprehensive legislative scheme.

ARGUMENT

I

THE ORDER AUTHORIZING THE USE OF THE PEN REGISTERS WAS PROPERLY ISSUED

A. THIS ISSUE WARRANTS REVIEW IN THIS CASE

In its Reply (pp. 12–19) to our certiorari petition, respondent argued that pen register orders are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520. In the district court, however, respondent apparently conceded that Title III did not apply (Pet. App. 33a, 35a). The court of appeals, noting respondent's agreement "that pen register orders are not covered by Title III" (Pet. App. 4a, 6a),[12] held that Title III does not apply to pen registers[13] (Pet. App. 3a–8a); accordingly, the court's judgment (Pet. App. 25a–26a) affirmed this aspect of the district court's decision. Although respondent apparently now wishes to argue that this portion of the court of appeals' judgment should be reversed, it did not file a cross-petition for a writ of certiorari.

In these circumstances, there is some doubt whether respondent is entitled to challenge the decision of the

[12] Respondent's brief in the court of appeals is less clear on the point.

[13] Every court of appeals that has considered the matter agrees. *United States* v. *Southwestern Bell Telephone Company*, *supra*; *United States v. Illinois Bell Tel. Co.*, *supra*.

court below on the Title III issue.[14] See *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431–432. As one commentator has put it, "*Mills* and *Express Publishing* both appear to hold that when the logical result of acceptance of a respondent's additional argument would be to change more of the judgment than is brought into issue by the initial appeal, a cross-petition must be filed even though the respondent is not asking that the judgment be altered but is content that it be affirmed." Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 772 (1974); see also *Strunk* v. *United States*, 412 U.S. 434, 437; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4.

We do not believe, however, that the requirement of a cross-petition in these circumstances is a rigid rule. "[A] party satisfied with a judgment"—as the telephone company was in this case—"should not have to appeal from it in order to defend it on any ground

[14] The issue whether pen register orders are governed by Title III is not fairly comprehended in the question presented in our petition (Pet. 2). It would be unusual indeed for a petitioner to seek review of the portion of the judgment in petitioner's favor and we did not intend to do so here. In light of respondent's position below, our question presented refers to an "admittedly valid order" authorizing the FBI to install a pen register (Pet. 2) and we discussed only the authority of the district court to order the company to furnish leased lines (Pet. 9–20).

which the record and the law permit." Stern, *supra,* 87 Harv. at 774. This, of course, is the general rule. See *Langnes* v. *Green,* 282 U.S. 531; *Dandridge* v. *Williams,* 397 U.S. 471, 475–476, n. 6. If the federal government, as a potential respondent, were required to review all judgments of the courts of appeals that it found satisfactory to determine whether it should nevertheless file a cross-petition because the losing side might file a petition that could be granted, the burden would be considerable both to the government and the Court.[15]

We submit, instead, that the Court, when it has jurisdiction of a case on certiorari, also has discretion to decide an issue urged upon it by a non-petitioning respondent if the issue is otherwise worthy of the Court's consideration—even though acceptance of the respondent's arguments would require reversal of part of the judgment but not the ultimate result of the decision below. That, we believe, is the rule laid down in *United States* v. *ITT Continental Baking Co.,* 420 U.S. 223, 226–227, n. 2.

Because, in our view, respondent's argument that pen register orders are governed by Title III has little force and because no court of appeals has accepted it, we would oppose certiorari if only this issue were presented. However, we believe the issue warrants review in this case because it is so intimately related to the ultimate controversy regarding the district court's power to order the company to furnish technical assistance. We therefore address respondent's arguments on the Title III question.

[15] See Stern, *supra,* 87 Harv. L. Rev. at 775–776.

B. TITLE III DOES NOT GOVERN THE AUTHORIZATION OF THE USE OF A PEN REGISTER

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510–2520, sets forth the procedure the government must follow in securing judicial authority to intercept wire communications in the investigation of serious offenses. It is common ground that in this case the FBI's application for a pen register order, which the district court granted, did not follow the procedures of Title III. In our view, however, this was not necessary. For we agree with Mr. Justice Powell that the "installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III." *United States* v. *Giordano, supra,* 416 U.S. at 553.[16]

The procedures of Title III apply only to orders "authorizing or approving the *interception* of a wire or oral communication * * *." 18 U.S.C. 2518(1) (emphasis added). Congress defined "intercept" to mean "the *aural* acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. 2510 (4) (emphasis added).

[16] The Court majority in *Giordano* did not reach the issue, it suppressed evidence derived from the pen register because this evidence was in turn derived from an invalid wiretap. 416 U.S. at 533–534, n. 19.

Pen registers are not covered by Title III for the quite apparent reason that they do not involve the aural acquisition of the contents of any communication. Pen registers decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the dial on the telephone; the information is presented in a form to be interpreted by sight, not by hearing, as is the case in an "aural" acquisition.

Moreover, the content of the telephone call—the communication—is not recorded by the pen register. Pen registers disclose only the telephone numbers that have been dialed; they do not disclose the existence of any communication between any specific users of the two telephones or even whether the call was completed.[17] Rather than reporting the existence of communications, pen registers record only the act of dialing—an effort to establish a communication. Pen registers do not intrude upon the spoken word.[18] The pen register reveals nothing more than what has been voluntarily disclosed to the telephone company—in-

[17] It has been suggested that the ringing of the telephone whose number has been dialed may constitute a communication (*United States* v. *Caplan*, 255 F. Supp. 805, 808 (E.D. Mich.)), but the pen register does not disclose whether that telephone is ringing; the number may be busy.

[18] The act of dialing might be characterized as a communication to the telephone company; it is a request to provide service. But that is not the type of communication Congress intended to protect. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 90 (1968). See Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 Cornell L. Rev. 1028, 1039–1042 (1975).

formation similar to that used in compiling telephone toll or message unit billing records."[19] Cf. *United States* v. *Miller*, 425 U.S. 435, 442–443.

The legislative history could not be clearer on this point. The Senate Report explained that the definition of intercept was designed to limit the scope of the Act to aural acquisitions of the contents of wire or oral communications: "Other forms of surveillance are not within the proposed legislation. * * * The proposed legislation is not designed to prevent the tracing of phone calls. *The use of a 'pen register,' for example, would be permissible.* But see *United States* v. *Dote*, 371 F. 2d 176 (7th Cir. 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication" (S. Rep. No. 1097, *supra*, at 90) (emphasis added).[20]

[19] Such records are excluded from Title III. S. Rep. No. 1097, *supra*, at 90; *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2).

[20] Respondent seeks to avoid the force of this language by postulating that Congress referred to *Dote* because it wanted to allow the telephone companies to continue to use pen registers in the ordinary course of their business, "as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case" (Reply to Pet. 18). But Congress could scarcely have sought to make that point in such a cryptic manner, particularly in light of the specific provision in 18 U.S.C. 2511(2)(a)(i) that excludes from the prohibitions of the Act all normal telephone company business practices. Rather, the "But see" cite was evidently intended to indicate here, as it did elsewhere in the Report, cases that would be overruled by the proposed legislation. See S. Rep. No. 1097, *supra*, at 100, 108.

Pen registers thus do not present the problems with which Congress was concerned in Title III and Congress acted on the firm belief that the new legislation would not affect the continued use of these devices in the investigation of criminal activities.[21] The court below correctly concluded (Pet. App. 3a–8a), as did the other courts of appeals that have passed on the issue,[22] that pen register orders are not subject to the requirements of Title III.[23]

[21] In Section 803 of Title III, 82 Stat. 223, Congress also amended Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605, which had prohibited the interception and divulgence of "any communication" by wire or radio. A court of appeals had held this prohibited a telephone company from releasing the results of its pen register investigation to the government. *United States* v. *Dote*, *supra*. Congress in effect overruled *Dote* by limiting Section 605 of the Communications Act to the interception of "any radio communication." See *Korman* v. *United States*, 486 F. 2d 926, 931–932 (C.A. 7).

[22] See p. 16, *supra*.

[23] Contrary to respondent's suggestion (Reply to Pet. 14), this conclusion significantly facilitates criminal investigations. Congress has permitted federal wire interceptions to be used to investigate only certain specified criminal offenses (18 U.S.C. 2516(1)). Pen registers may be useful in the investigation of other crimes—*e.g.*, fugitive offenses, 18 U.S.C. 1071 *et seq.*; escape, 18 U.S.C. 751; fraud offenses, 18 U.S.C. 1341 *et seq.*; firearms offenses, 922, 18 U.S.C. App. 1202; civil rights offenses, 18 U.S.C. 241 *et seq.*, and tax offenses, *e.g.*, 26 U.S.C. 7201 *et seq.*, 7262, 7272, See, *e.g.*, *United States* v. *Illinois Bell Tel. Co.*, *supra*, 531 F. 2d at 811.

Even when the crime under investigation is one identified in Title III, the use of a pen register before seeking authority to intercept conversations may often be desirable to verify the need for a Title III interception and corroborate the probable cause that must be shown in the application for the authorizing order. This verification process may also, of course, indicate that there is no probable cause for the interception, and thus protect the privacy of innocent persons suspected of crimes.

The use of Title III procedures to obtain authorizations for the use of pen registers would substantially increase the administrative burden of law enforcement officers, in a way detrimental to a fast breaking criminal investigation. Wire interception applications go through "some six stages of review from the U.S. Attorney or local Federal Strike Force through the central offices of the Attorney General in Washington." *Electronic Surveillance*, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, p. 7 (1976). They also require the personal consideration of the Attorney General or an Assistant Attorney General. See *United States* v. *Giordano*, *supra*.

[24] Federal judges are considered federal magistrates under the Rules. Rule 54(c), Fed. R. Crim. P.

II

THE ORDER REQUIRING RESPONDENT TO ASSIST IN INSTALLING THE PEN REGISTERS WAS PROPERLY ISSUED

It is undisputed that the warrant in this case satisfied the Fourth Amendment, which Mr. Justice Powell believed to be the sole constraint upon the government's use of pen registers. *United States* v. *Giordano, supra,* 416 U.S. at 553–554. The authority of district judges to issue pen register orders is contained in Rule 41, Fed. R. Crim. P., which governs the granting of search warrants. The courts below were in agreement that Rule 41 applied (Pet. App. 6a–8a, 37a–38a).

The only possible doubt on this score stems from the clause in Rule 41(b) empowering federal magistrates[24] to issue warrants authorizing a search for and seizure of any "property that constitutes evidence of the commission of a criminal offense" and

Rule 41(h) defining property "to include documents, books, papers and any other tangible objects." That "property" includes tangible items does not, however, lead to the conclusion that it excludes intangible items, such as dial impulses recorded by a pen register.[25] The Court stated as much in *Katz* v. *United States*, 389 U.S. 347, 355–356, and *Osborn* v. *United States*, 385 U.S. 323, 329–330, by holding in *Osborn* and indicating in *Katz* that valid federal warrants could be obtained to search for and seize intangible objects—in those cases, oral communications.[26] Rule 41 does not itself restrict the objects of searches; it is

[25] When the framers of Rule 41 intended a definition to be all inclusive they introduced it with the phrase "to mean." See *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125, n. 1. Thus, Rule 41(h) provides (emphasis added): "This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule *to include* documents, books, papers and any other tangible objects. The term 'daytime' is used in this rule *to mean* the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase 'federal law enforcement officer' is used in this rule *to mean* any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

[26] In *Katz* v. *United States*, *supra*, 389 U.S. at 356, n. 16, the Court stated that the notice requirement in Rule 41(d) was not so inflexible that notice always had to be given before the search commenced. For similar reasons, the requirement in Rule 41(c)(1) that the search be conducted within 10 days of the issuance of the warrant is not so rigid as to mean that a pen register surveillance can continue for 10 days and no longer. Whether the device must be installed within 10 days of the order is not at issue in this case.

congruent with the Fourth Amendment, allowing warrants to issue with respect to intangible as well as tangible items that are proper subjects of a search. Dial impulses are within that category.[27]

This brings us to the ultimate issue in the case: whether the district court properly ordered the telephone company to provide the FBI with the necessary leased lines. Without this assistance, the court's warrant authorizing the FBI to install and use a pen registers would have had no effect despite its validity under the Fourth Amendment and the Federal Rules of Criminal Procedure (Pet. App. 13a–14a). In this situation, the district court had authority under the All Writs Act, 28 U.S.C. 1651(a),[28] to require respondent to provide the necessary facilities for installation of the pen registers. Accord, *United States* v. *Southwestern Bell Telephone Co., supra*, 546 F. 2d at 246, n. 7; *United States* v. *Illinois Bell Tel. Co.*, 531 F. 2d 809, 814; cf. *Stern* v. *South Chester Tube Co.*, 490 U.S. 606, 609–610; *Board of Commissioners of Knox County* v. *Aspinwall*, 24 How. 376, 383–385; *Weber* v. *Lee County*, 6 Wall. 210; *Clark Equipment Co.* v. *Armstrong Equipment Co.*, 431 F. 2d 54 (C.A. 5),

[27] Since we believe that Rule 41 is broad enough to authorize a warrant permitting the installation of a pen register, we do not discuss whether the Fourth Amendment itself could serve as a basis for issuance of the warrant in this case. Cf. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388; Rule 57(b), Fed. R. Crim. P.

[28] The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

certiorari denied, 402 U.S. 909; and cases cited at Pet. App. 18a–19a (dissenting opinion) Such an order implements the Rule 41 warrant. See *Rea* v. *United States,* 350 U.S. 214, 217–218; *id.* at 219 (dissenting opinion).[29]

It is important to recognize that respondent is no ordinary third party. It is a corporation acting as public utility and the "primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders." *United Gas Co.* v. *R.R. Comm'n.,* 278 U.S. 300, 309; *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U.S. 92, 99–100. The government desired the company's service in the form of leased lines; as a communications carrier, the telephone company had an obligation under either federal or state [30] law to furnish "service upon reasonable request therefor." 47 U.S.C. 201(a).[31]

The company was not at liberty to refuse to provide the leased lines and thereby itself decide whether the FBI's investigation should cease or proceed in another manner. The district court had issued a warrant, supported by probable cause, authorizing the use of

[29] Contrary to respondent's suggestion (Reply to Pet. 10–11), we do not rely on the All Writs Act as an independent jurisdictional basis for the district court's order. That basis is provided by Rule 41, Fed. R. Crim. P., on which the order authorizing the installation of the pen registers rests. The order to the telephone company, necessary to effectuate the underlying order, rests on the All Writs Act, which thus performs its traditional function of authorizing implementing orders.

[30] New York Public Service Law, Section 91 (McKinney 1955).

[31] The carrier's failure to fulfill its federal obligation may subject it to civil (47 U.S.C. 406) and criminal (47 U.S.C. 202, 501) sanctions.

the pen registers. The order accompanying the warrant and necessary to its implementation did not require the company to furnish any unusual or burdensome services. The court majority recognized that "providing lease or private lines is a relatively simple, routine procedure" (Pet. App. 13a). Nor was respondent directed to undertake this service free-of-charge; the judge's order provided that it would be reimbursed at the prevailing rates. On all counts, the district court's order was reasonable and, in the language of the All Writs Act, "agreeable to the usages and principles of law." 28 U.S.C. 1651(a).[32]

Furthermore, respondent had a special obligation to provide leased lines in this case. The telephone company was far from an innocent bystander pressed into burdensome service for the common good. There was probable cause, the district judge found, to believe that the telephone company's facilities were being used in the commission of federal criminal offenses.[33] Viewed in this light, the district court's order merely required the company to lease lines for the investigation of crimes being committed through the use of the company's telephone lines.

[32] The company's compliance with the court's order would not have subjected it to any civil or criminal liability. Pet. App. 9a; *United States* v. *Southwestern Bell Telephone Co.*, *supra*, 546 F. 2d at 246, n. 6; *United States* v. *Illinois Bell Tel. Co.*, *supra*, 531 F. 2d at 814–815.

[33] It is no part of a communication carrier's public duty to supply service to subscribers who wish to use their telephones for unlawful purposes. Respondent and its parent company recognize as much. New York Tel. Co., Public Service Comm'n. Tariff No. 800, Section H.5 (July 14, 1973); AT&T Tariff F.C.C. No. 263, Section 2.2.3 (January 1, 1969).

It is no answer to say, as did the court of appeals majority, that sustaining the district court's order could serve as a "dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties" (Pet. App. 15a). The court of appeals was bound to rule on the case before it, not on some hypothetical future case. It was required to decide only whether the district court could properly order the telephone company, not some other private individual, to provide the assistance necessary for the execution of a valid warrant—a warrant supported by probable cause to believe that the company's facilities were being employed in a criminal venture. Analysis of that issue, we submit, leads to the conclusion that the district court had such power and that it properly exercised it in this case.

The court majority's apparent fear that agents might abuse the authority to install pen registers is unfounded and lends no support to its decision regarding the order to the telephone company (Pet. App. 15a–16a). Respondent, expressing the same concern, states that "once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit" (Reply to Pet. 13).[34]

[34] It is true that when a pen register is attached to a subscriber's line, the same physical connection can be used to attach other equipment that can intercept oral communications. But agents who conduct pen register investigations are instructed that any monitoring of wires is unlawful and should not be attempted.

Some pen registers have jacks, as respondent notes, that permit the attachment of other equipment sensitive to voices; without such equipment, however, the monitoring of conversations is impossible and agents are not issued the additional equipment. Moreover, when possible, any jacks are disabled from the inside before the pen registers are installed.

If the telephone company believes these precautions and the criminal and civil sanctions discussed in the text are insufficient, it could offer to have the pen registers installed and monitored by the agents at the telephone company central exchange, where the opportunity to use unauthorized equipment would be extremely limited. Or the telephone company itself could attach a pen register to the subject telephone lines and then transmit the dial impulses over a leased line to the monitoring agents. In this situation an agent would not have the ability to monitor conversations even if he had the desire, because he would not have direct access to the telephone lines of the suspect. Or the telephone company could operate the pen register itself, providing the government with the results. See *United States* v. *Dote*, 371 F. 2d 176 (C.A. 7). The use of any of these alternatives would eliminate the "inherent capability of abuse" of pen registers (Reply to Pet. 13, 19).

All this entirely ignores that a pen register warrant authorizes, as did the warrant here (App. 6–7), only the installation and use of a pen register and that Congress has already legislated to prevent precisely the kind of abuse envisioned by the court majority and respondent. Under Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968, if a federal agent—or any other law enforcement officer—engaged in unauthorized wiretapping by plugging into a pen register as respondent suggests, he would be subject to severe criminal sanctions[35] and

[35] See 18 U.S.C. 2511(1), which provides that any person who willfully intercepts any wire communications without court authorization pursuant to Title III shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[36] See 18 U.S.C. 2520, which provides that any person whose wire or oral communication has been intercepted in violation of Title III shall be entitled to recover from the violator actual damages not less than $100 per day for each day of violation, punitive damages, attorney's fees and litigation costs.

civil liability.[36] To speculate that despite these sanctions violations might occur, and to transform this speculation into a basis for a court's withholding authorization, is to argue against the issuance of search warrants of any sort. One might as well say, for example, that a court should not grant a warrant to search for a pistol in a suspected murderer's apartment because the officers might conduct a general search for other items in violation of the Fourth Amendment.

Nor is there substance in the court majority's further point, in support of its reversal of the order against the telephone company, that if the government "requires technical assistance, it is far better to have the authority for ordering that assistance clearly defined by statute" (Pet. App. 16a). This fails to recognize the quite obvious fact that Congress can legislate even if the courts issue orders such as the one involved in this case; the courts' actions would in no way bar Congress from entering the area if this were thought appropriate.

Moreover, it is far from certain that the legislative branch is better suited than the judicial to the task of deciding when and under what circumstances a telephone company may be ordered to provide the assistance needed to install a pen register or any other type of assistance. The Senate Report on Title III, quoted at p. 21, *supra,* indicates that Congress apparently assumed that legislation to govern pen registers was not required. And, as Judge Mansfield pointed out in dissent (Pet. App. 24a) "since the terms, conditions and limits of such assistance would vary according to the

circumstances of each particular case, the subject is better suited to judicial exercise of discretion under the All Writs Act than to a precise or detailed statutory blueprint." Indeed, when Congress provided explicit authority for judicial orders requiring telephone company assistance in installing wiretaps, Congress did not limit that authorization by any such statutory blueprint.[37]

All that remains is the court's discussion of the fact that Congress amended Title III in 1970 to require common carriers to give technical assistance in connection with wiretaps and other interceptions covered by Title III. To the court majority (but not to the dissenting judge (Pet. App. 21a–22a)), this illustrated a congressional "doubt that the courts possessed inherent power to issue such orders" and therefore "it seems reasonable to conclude that similar authorization should be required in connection with pen register orders" (Pet. App. 15a). The argument fails not only because the premise is incorrect but also because the conclusion would in any event not follow.

In *Application of the United States,* 427 F. 2d 639 (C.A. 9), the district court had refused the government's request for an order directing the telephone company to provide assistance in conducting a court-

[37] See 18 U.S.C. 2518(4), which provides in pertinent part that "[a]n order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier * * * shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively * * *."

authorized wiretap. The court of appeals held that since Title III is a "comprehensive legislative treatment" of wiretapping, and in "view of the breadth and apparent self-sufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks," it would not infer that authority from the Act. *Id.* at 643. The court stated, "[f]or all that the Act and its legislative history disclose, Congress meant to limit approved interceptions to those which could be accomplished without the active assistance of the carrier, or at least to those in which that assistance would be forthcoming on a voluntary basis." *Id.* at 644.

As a result, Congress promptly amended Title III to provide that wire intercept orders should, at the government's request, include a provision requiring the assistance of "a communication common carrier, * * *." 84 Stat. 654, 18 U.S.C. 2518(4).[38] The legislative history of this amendment reveals that Congress was only resolving any possible ambiguity in the statute in order to make clear what had previously been implicit in Title III. See, *e.g.*, 115 Cong. Rec. 37192 (1969) (Senator McClellan); 115 Cong. Rec. 37193 (1969) (Senator Tydings, who had been instrumental in the enactment of Title III).[39] Congress' action was not an acceptance of the Ninth Circuit's views, but

[38] The amendment also provided that reliance on a court order would constitute a defense to any civil or criminal action (18 U.S.C. 2520) and that it was not unlawful for a communication common carrier to provide such assistance. 18 U.S.C. 2511(2)(a)(ii).

rather "more in the nature of an overruling of that opinion." *United States* v. *Illinois Bell Tel. Co., supra,* 531 F. 2d at 813. See also *United States* v. *Southwestern Bell Telephone Co., supra,* 546 F. 2d at 246.

In any event, even if Congress' action constituted a ratification of the Ninth Circuit's views, it would not follow that such explicit statutory authorization is needed for the order issued to the telephone company here. The basis for the conclusion that such statutory authorization was necessary in regard to wiretaps was the existence of a comprehensive statutory scheme covering all other aspects of wire interceptions. No similar statutory scheme exists for pen registers. Accordingly, there can be no similar objection to a court's issuing an order to the telephone company so that the pen register warrant can be implemented.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it reversed

[39] The proposed electronic surveillance statute discussed in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, Appendix C (1967)) upon which Title III was based (see *United States* v. *Giordano, supra*, 416 U.S. at 517–518, n. 7), contemplated that the telephone company had a duty to assist law enforcement agencies in installing wire taps (*id.* at 104). Nothing in the original Title III indicates that its drafters rejected this idea; instead, the legislative history noted above suggests that they simply believed an explicit statement of this obligation unnecessary.

the district court's order directing the telephone company to provide assistance. In all other respects, the judgment should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

No. 76-835

UNITED STATES OF AMERICA,

Petitioner,

v.

NEW YORK TELEPHONE COMPANY,

Respondent.

BRIEF FOR NEW YORK TELEPHONE COMPANY

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MISCELLANEOUS

In the

Supreme Court of the United States

No. 76-835

United States of America,
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v.

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BRIEF FOR NEW YORK TELEPHONE COMPANY

Preliminary Statement

Respondent New York Telephone Company is pleased that the Court has granted *certiorari* to provide guidance and resolve the conflict that now exists as to the responsibility of telephone companies when law enforcement authorities seek to use devices which are still somewhat euphemistically, and certainly archaically, referred to as "pen registers"* for investigatory purposes and to require telephone company assistance through the provision of facilities and technical assistance, where such authorities do not proceed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510, et seq.).

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* See footnote 2, *infra*.

Respondent has no desire to obstruct law enforcement authorities in the carrying out of their vital functions. Indeed, it is desirous of cooperating to the extent this Court or Congress deems it to be in the public interest. At the same time, it has a long-standing policy of fostering the privacy of communications. Protection of this privacy is fundamental to the telephone business. It is also required by statutory and decisional law, with limited exceptions in the interest of national security and the enforcement of the criminal law.

After forty years of wrestling with the problem by courts and legislative bodies, beginning with *Olmstead* v. *U.S.*, 277 U.S. 438, 48 S.Ct. 564 (1928), and culminating in *Katz* v. *U.S.*, 389 U.S. 347, 88 S.Ct. 507 (1967) and *Berger* v. *New York*, 388 U.S. 41, 87 S.Ct. 1873 (1967), Congress passed Title III, a comprehensive act which attempts to strike an appropriate balance between the need to protect the privacy of communications and the need for effective law enforcement. This Act provides for electronic surveillance for limited purposes and with detailed safeguards. As subsequently amended, it also specifically authorizes orders directing third parties, including telephone companies, to provide assistance when those safeguards are met.

In the case at issue, the Government could have proceeded under Title III, but chose not to do so. As the number of cases pending or decided around the country indicates,[1] and as is clearly indicated in Petitioner's Brief (fn. 23, pp. 22-23), this is a deliberate policy. By seeking authority only for installation of "pen registers," instead of full wiretap permission, the Government believes it

[1] *United States* v. *Illinois Bell Tel. Co.*, 531 F2d 809 (7th Cir. 1976); *United States* v. *Southwestern Bell Tel. Co.*, 546 F2d 243 (8th Cir. 1976) petition for a Writ of Certiorari pending No. 76-1157, *Ohio Bell Tel. Co.* v. *United States*, No. 76-2627, *South Central Bell Tel. Co.* v. *United States*, No. 77-3091 (both pending before the Sixth Circuit).

need not comply with the safeguards so carefully worked out by Congress in Title III, and that it may nevertheless demand the same degree of participation from telephone companies as though it had proceeded in accordance with Title III.

Believing that an important issue of public policy is at stake, Respondent has refused to acquiesce in the course taken by the Government, but has cooperated in seeking adequate judicial guidance. Respondent does not believe that, except pursuant to Title III, it is proper for the district courts to authorize the use of pen registers by law enforcement authorities and to order third parties to provide affirmative assistance. Respondent does not believe its employees should be required to participate in criminal investigative procedures that have not been expressly authorized by the Congress or sanctioned by this Court.

Question Presented

Whether a United States district court has the authority, when the requirements of Title III have not been complied with, (1) to authorize the installation of a pen register for the surveillance of a telephone line by law enforcement officials, and (2) to order a telephone company to provide affirmative assistance in carrying out such surveillance.

Statement

As set forth in Petitioner's Brief, on March 19, 1976, Judge Tenney of the United States District Court for the Southern District of New York issued an order which authorized pen register[2] interception of two telephone lines

[2] The Government's brief, on pp. 5-6, sets forth a rather innocuous description of a pen register and its capabilities that

(footnote continued on following page)

by agents of the Federal Bureau of Investigation (FBI) and directed Respondent to furnish the FBI "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively" (App. 7). The record reveals that this interception was authorized as part of an on-going FBI investigation of a gambling enterprise in alleged violation of 18 U.S.C.A. § 1952 (id. p. 1)). The affidavit submitted by the FBI special agent in support of Judge Tenney's *ex parte* order indicates that an informant identified as "Source A" had informed the FBI that the suspects had switched telephones to conduct their illegal operations and were using the telephones for which the pen register order was obtained (id. 2-4). In fact, on February 19, 1976, the Government had sought and obtained from Judge Tenney, based on information supplied by the informant, "Source A," a wiretap order pursuant to Title III for the telephone previously used by these suspects.

(footnote continued from preceding page)

states "none of the pen register devices can overhear oral communications and none can indicate whether outgoing calls are actually completed." This does not accurately describe the capabilities of a modern pen register device. The record demonstrates, other courts have realized, and indeed the Government in its brief later admits (fn. 34, pp. 23-20), once a modern pen register is installed, full wiretap capability is present simply by plugging in headphones or a tape recorder. See App., pp. 13 & 16. The Court of Appeals for the Fifth Circuit found:

> ". . . the expert testimony below indicated that once a pen register has been installed, a full wiretap 'interception' of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit. *In Re Joyce*, 506 F.2d 373 at 377 (1975)."

To the same effect is Judge Lay's statement in his dissenting opinion in *United States* v. *Southwestern Bell Telephone Co.*, 546 F.2d 243 (8th Cir. 1976)

> "It is conceded by the parties that such surveillance [pen register] can be abused and that private conversations on touch-tone telephones can be intercepted." p. 250.

For a further description of the physical attributes and capabilities of a modern pen register, see pp. 19-20, *infra*.

Pursuant to this earlier order, Respondent was directed to and did supply information, technical assistance and facilities (including a leased line) to the FBI. The Government chose, in obtaining the order at issue, not to proceed under the provisions of Title III,[3] as it had in the earlier interception.

Pursuant to the March 19 Order authorizing the pen register interception, the FBI demanded that Respondent supply leased lines from East 14th Street in the Borough of Manhattan, where the two telephones to be intercepted were located, to the FBI's headquarters on 69th Street in the same borough where apparently the pen register surveillance was to take place. Respondent declined to furnish the leased lines pending further judicial consideration, since Respondent questioned the legal authority of the district court to issue the March 19 Order outside of the provisions of Title III. On March 30, 1976, Respondent filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 Order. The district court denied Respondent's Motion and Respondent immediately appealed to the Court of Appeals for the Second Circuit. That court refused to vacate the district court's order, but authorized an appeal on an expedited basis.

The court of appeals reversed that portion of the district court's order directing Respondent to provide facilities and technical assistance. In its opinion, the court first

[3] It is interesting to note that the March 19 Order, which concededly does not comply with Title III, nevertheless contains references to various provisions thereof. For example, the order recites that the offense being investigated is one of the enumerated offenses in Section 2516 of Title 18 for which a Title III order may be obtained. The order in directing Respondent to provide assistance refers to Respondent as a communication carrier as defined by Title III (18 U.S.C.A. 2510(10)). What the order does not refer to is any authorization of the Attorney General or his designate required by 18 U.S.C.A. 2516 or the notification requirements contained in 18 U.S.C.A. 2518.

addressed the issue of whether the district court had authority to authorize surveillance of a telephone line through the use of a pen register, outside of the statutory provisions of Title III. The court found that the district court had such authority, agreeing with the rationale of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, 531 F.2d 809 (1976), that the authority to issue such an order outside of Title III could be found either in the inherent power of the district court or by analogy to Rule 41 F.R. Cr.P. In so doing, however, the court recognized that Rule 41 was not directly applicable:

> "While the electronic impulses recorded by pen registers are not 'property' in the strict sense of that term as it is used in Rule 41(b), we concur in the Seventh Circuit's suggestion that there exists a power akin to that lodged in Rule 41 to order the seizure of nontangible property. But see *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device*, 407 F. Supp. 398 (W.D. Mo. 1976)."[4] (P. App. 7a-8a)

The court next addressed the issue of whether the district court could properly order Respondent to provide technical assistance and facilities to federal law enforcement agents in placing and operating a pen register outside of the provisions of Title III. The court stated:

> "This question is of some significance not only because of its immediate impact on the Telephone Company, but also because of its broader implications regarding the power of a federal court to mandate law enforcement assistance by private citizens and corporations under the threat of the contempt sanction." (id. p. 9a).

[4] In the cited case, the District Court for the Western District of Missouri held, contrary to the majority's decision here, that Rule 41 was clearly not applicable and that a district court had no inherent authority outside of the provisions of Title III to authorize federal authorities to use a pen register. Such authority was also questioned by Judge Lay, dissenting, in *United States* v. *Southwestern Bell Tel. Co.*, *supra*.

It held that:

> ". . . in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." (id. p. 13a).

The Court agreed with the statement of the Ninth Circuit in *Application of the United States*, 427 F.2d 639 at 644 (1970) that:

> "If the government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its plea to Congress."[5]

The majority expressly rejected the reasoning of the Seventh Circuit in *United States* v. *Illinois Bell Tel. Co.*, *supra*, that the quick action of Congress in amending Title III after the Ninth Circuit decision in *Application of the United States, supra*, indicated an assumption by Congress that district courts inherently have the power to require affirmative assistance:

> "On the contrary, we think it is just as reasonable, if not more reasonable, to infer that the prompt action by the Congress was due to a doubt that the courts

[5] In this case, decided prior to the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 and 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order, the Government had urged that a district court had inherent authority to require a telephone company to provide such assistance in placing a Title III wiretap. The Ninth Circuit rejected that argument holding that, absent express statutory authorization, a federal district court was without power to compel technical cooperation by a telephone company in the interception of wire communications.

possessed inherent power to issue such orders, or that courts would be unwilling to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance. In any case, as Congressional authority was thought to be necessary in Title III cases, it seems reasonable to conclude that similar authorization should be required in connection with pen register orders, especially as the two are so often issued in tandem." (id. p. 15a)

The court then went on to express its concern that a finding of inherent authority in a district court to order such affirmative assistance, without any clear statutory guidelines, was dangerous to the rights of private third parties who might be directed to aid government in its law enforcement endeavors. The court stated:

"Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise precedent for the authority of federal courts to impress unwilling aid on private third parties. We were told by counsel for the Telephone Company on the oral argument of this appeal that a principal basis for the opposition of the Telephone Company to an order compelling it to give technical aid and assistance is the danger of indiscriminate invasions of privacy. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step." (id. p. 15a)

Realizing the potential danger inherent in holding that a district court can direct third parties to affirmatively assist law enforcement without any statutory basis or guidelines and mindful of the dangerous precedent for future

orders directed to third parties, the court refused to "take the first step" and hold that the district court had either inherent authority or authority under the All Writs Act to compel Respondent's affirmative assistance in this case.

ARGUMENT

I

A district court has no authority to authorize "pen register" surveillance by law enforcement except pursuant to Title III.

We are pleased that the Solicitor General agrees that the issue of the authority of a district court to authorize pen register surveillance outside of the provisions of Title III should be addressed by the Court. We believe it is entirely appropriate—indeed, necessary—for the Court to determine this underlying issue in the case at bar, as well as the power of the district court, once an order authorizing a pen register has been issued, to require a telephone company to provide facilities and technical assistance without statutory authorization. As we pointed out in our reply to the Petition for Certiorari (p. 3), "The question of the power or propriety of the issuance of the order to the Telephone Company does not arise without sanctioning, at least implicitly, the authorization of pen register surveillance outside Title III, and this Court should not do so without full consideration."

Obviously, Respondent's *direct* interest is with respect to the order issued to it. Consequently, the primary thrust of its opposition in the district court was directed to that aspect. Nevertheless, it is, as we pointed out, "somewhat inaccurate" for the issue to be presented to this Court on the basis that the orders for the pen registers are "admittedly valid." Respondent did raise the issue of validity in the court of appeals, as is evident by the ex-

tensive attention given to this point in the opinion of the court. Furthermore, the question has been raised in the other cases in other circuits (see Petition for a Writ of Certiorari, *Southwestern Bell Telephone Company* v. *United States of America,* No. 76-1157 now pending).[6]

The Government argues, and the court below found, that orders authorizing a pen register may be issued outside of the statutory provisions of Title III. This conclusion is based on (1) the definition of "intercept" contained in the statute, (2) a passing reference to pen registers in the lengthy legislative history of Title III, and (3) a statement of Mr. Justice Powell in his concurring and dissenting opinion in *United States* v. *Giordano,* 416 U.S. 505, 94 S.Ct. 1820 (1974). Both the Government and the court below ignore the fact that, prior to the enactment of Title III, Section 605 of the Communications Act of 1934 (47 U.S.C. 605) clearly prohibited the use of pen registers by law enforcement officials, and nothing in Title III specifically changes that rule. Prior to the enactment of Title III, Section 605 in pertinent part provided as follows:

> ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ."

This Court in *Benanti* v. *U.S.,* 355 U.S. 96, 78 S.Ct. 155 (1957), held that the prohibition of Section 605 was absolute and applied both to federal and state law enforcement officials. The Court emphasized that disclosure even of the existence of a communication was protected. See 355 U.S., p. 100, fns. 5 & 6. Courts faced with the express issue of

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[6] In this connection we would also point out that applications for pen register orders are made *ex parte,* and it is desirable that this point be ruled upon now rather than await a *post hoc* appeal asserting improper investigatory techniques.

whether the use of a pen register was prohibited by Section 605, because it revealed the existence of a communication, consistently held that pen registers were so prohibited. Thus, in *U.S.* v. *Guglielmo,* 245 F.Supp. 534 (1965), the court stated:

> "It is obvious from the facts that the instant unconsented use of a pen register violated the integrity of telephone communications and the clear prohibition of § 605 . . . *Nardone* v. *U.S.,* 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307." (p. 536)

In *U.S.* v. *Caplan,* 255 F.Supp. 805 (1966), the Government urged that the use of a pen register was not an "interception." The court responded:

> "[4] As an alternate basis for holding that the government made forbidden use of the pen register data, I find that an 'interception' took place under the circumstances here and that under *Benanti* v. *United States,* 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed. 2d 126 (1957), no authority can permit this." p. 808

In *U.S.* v. *Dote,* 371 F.2d 176 (7th Cir. 1966), the Government urged (as the petitioner is urging here with respect to Title III), that the prohibition in Section 605 applied only to the substance of a telephone communication, and therefore the use of a pen register was permissible. The court expressly rejected this argument, stating:

> "[9] Further, we cannot pretend that the Government, while not hearing any verbal communication, did not inferentially have a reasonably good notion of the general substantive nature of the communications the pen register indicated were being initiated. In circumstances such as those in this case, knowledge of the existence of the communication is knowledge of its likely character.
>
> "[10] As the Supreme Court has said, in speaking of § 605, 'distinctions designed to defeat the plain mean-

ing of the statute will not be countenanced.' *Benanti* v. *United States*, 355 U.S. 96, 100, 78 S.Ct. 155, 157, 2 L.Ed.2d 126 (1957)." p. 181

Thus, it is clear, and Congress must have been aware, that prior to the enactment of Title III the use of a pen register by law enforcement officials was prohibited on the ground that it was an interception which revealed the existence of a telephone call.

The stated purpose of Congress in enacting Title III was to legislate comprehensively and preemptively in the area of the interception of communications. This is made clear in Section 801 of Title III in which Congress stated:

"(b) In order to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

• • •

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

This Court in *U.S.* v. *Giordano, supra*, interpreted Congress' intent as follows:

"The Act is not as clear in some respects as it might be, but it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." 416 U.S. at 515.

Respondent respectfully submits that Congress' intent, as expressed in the Congressional findings and as interpreted by this Court, is to have Title III govern all interceptions of telephone communications. It is also clear that prior to the enactment of Title III the use of pen registers by law enforcement was prohibited because it was deemed to be an interception. If Congress had intended to change the existing law and permit interceptions through the use of pen registers, it must be assumed it would have done so expressly through an unequivocal statutory mandate and not by a sort of backhanded exclusion through a definition of the term "intercept." As the District Court for the Western District of Missouri stated in denying the Government's application for an order authorizing a pen register outside of Title III:

"Established principles of statutory construction require courts to recognize that Congress does not legislate in a vacuum; Congressional legislation must be viewed in light of earlier legislation enacted in connection with the same subject matter and court decisions which have definitely determined the meaning and scope of that earlier legislation. Of particular significance, so far as Congressional action in regard

to electronic surveillance is concerned, are the cases which considered whether pen register devices were within the coverage of Section 605, Title 47, U.S.C., which banned all forms of electronic surveillance. Every case which considered the precise question concluded that pen registers were embraced in the prohibition of Section 605. We believe that it must be assumed that Congress knew that pen register devices were included within the coverage of Section 605 of the Communications Act of 1934, and that it knew that unless the pen register was taken out of the ban of Section 605, the use of such a device would still be prohibited. Section 803 of the Omnibus Crime Control and Safe Streets Act amended Section 605 to clearly reflect that all electronic surveillance is now to be governed by Title III."

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"It is clear that the language of Title III comprehends all forms of electronic surveillance, and the orders which the government seeks cannot be obtained independent of the procedures contained therein." *In the Matter of the Application of the United States of America for an Order Authorizing Use of a Pen Register Device,* 407 F. Supp. 405 & 408.

As set forth previously, the Government and the court below ignore the stated intent of Congress and the fact that the use of pen registers by law enforcement clearly was prohibited prior to enactment of Title III. Rather, they rely on the unartful use of the word "aural" in the definition of "intercept" contained in the Act. 18 U.S.C. § 2510(4) provides:

> "(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

The Government argues that since a pen register does not hear the spoken word of a telephone communication,

it is not an interception as defined by the Act. Respondent respectfully urges that giving such controlling significance to the word "aural" ignores the clear Congressional intent set forth above to legislate comprehensively and preemptively in the area of the interception of wire and oral communications. It also severely lessens the protection provided by the definition of "contents" as used in the Act. 18 U.S.C. § 2510(8) provides:

> "(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the *existence,* substance, purport, or meaning of that communication;" (emphasis added)

The courts have consistently held that a pen register does reveal the existence of a communication.

The interpretation of the word "aural" urged by the Government would also severely lessen the protection afforded other types of communication under Title III. If the Government is correct, and Title III applies only when the communication is acquired by hearing, law enforcement would be free to wiretap teletypewriter, facsimile, and data transmissions, because the acquisition of the contents of these wire communications would not be done "aurally." This surely was not the intent of Congress.

The Government and the court below also rely on the following cryptic statement from the legislative history of Title III:

> "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register', for example, would be permissible. But see *U.S.* v. *Dote,* 371 F.2d 176 (7th Cir. 1966)." S.Rep. No. 1097 90th Cong. 2nd Sess., 90 (1968)

A reading of *U.S.* v. *Dote,* casts doubt that by this language Congress intended law enforcement officials to be able to obtain authorization for the use of pen registers outside of Title III.

In *Dote,* a telephone company informed the Internal Revenue Service that it suspected a certain telephone was being used for bookmaking and, at the request of the IRS, installed a pen register. The company turned over to the IRS the results of the pen register without having been served with a subpoena or other judicial process. The court held that, while pen registers serve an important function in telephone company internal operations, and, therefore, their use was permissible, the release of the pen register results in that case without a subpoena was a violation of § 605 of the Communications Act. Thus, the statement in the legislative history that a pen register would be permissible, with the warning that the holding of *Dote* should be noted, would indicate that Congress was aware telephone companies used pen registers in the ordinary course of business and recognized that they could continue to do so, as long as they did not become an arm of law enforcement outside the provisions of Title III, as in the *Dote* case. Such an interpretation is clearly more consistent with the overall thrust of Title III than one that implies that Congress intended to authorize law enforcement agencies to use pen registers for investigative purposes outside of the strict requirements set forth in Title III.

Lastly, the Government and the court below rely on the following dictum contained in the concurring and dissenting opinion of Mr. Justice Powell in *United States* v. *Giordano, supra:*

> "Because a pen register is not subject to the provisions of Title III the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." (416 U.S., pp. 553-554)

In *Giordano* the Court ruled inadmissible evidence obtained through a Title III wiretap because the proper

authorization had not been obtained from the Attorney General or his specified designate. Authorization of the use of pen registers by law enforcement outside of the provisions of Title III was not an issue in the case. With all due respect to Justice Powell, this dictum should not be persuasive particularly in view of the Congressional intent set forth above that Title III apply to all interceptions and the acknowledged capability of a modern pen register to overhear conversations simply by plugging in a headphone or a tape recorder.

Realizing that there is no statutory basis for the use of a pen register by law enforcement outside of Title III, the Government states, "The authority of district judges to issue pen register orders is contained in Rule 41, Fed.R. Crm.P." But Rule 41 by its very language does not apply to pen registers. This was recognized by the court below which was constrained to find power in the district court "akin" to that provided by Rule 41. Rule 41 provides for the search and seizure of "property" which is defined "to include documents, books, papers and any other tangible objects."[7] Electronic pulses or tones sought and seized by a pen register are not included within this definition. Furthermore, in addition to the specification of tangible property as the object of the search, Rule 41 requires an inventory of the items seized and delivery of a copy of such inventory upon request to the individual from whom

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[7] The Government cites *Helvering* v. *Morgan's Inc.*, 293 U.S. 121 (1934) in support of its contention that the definition of "property" used in Rule 41 is not inclusive because of the use of the words "to include" and, therefore, covers intangible objects such as dial impulses recorded by a pen register. This Court in *Helvering* stated that the word "includes" in a statutory definition sometimes means the definition is not all inclusive, but that the entire statute must be reviewed to determine whether this was the intent of the drafters. A review of Rule 41 makes it apparent it was never intended to cover intangible property since, with respect to intangibles, it would be impossible to comply with the other provisions of Rule 41, such as inventory, delivery of the items seized, etc.

the property is seized. The order at issue here not only makes no reference to Rule 41, it also does not contain these requirements.

Respondent respectfully submits that jurisdiction to issue an order for a pen register outside of the statutory framework of Title III must be found within the provisions of Rule 41 (which, as just stated, it cannot be) or else the district courts do not possess it. Jurisdiction may not be created by analogy, by the use of terms such as "akin to." As Judge Lay stated in his dissent in *United States* v. *Southwestern Bell Telephone Company, supra:*

> "To me it is wrong that the judicial branch of government can thwart congressional intent and purpose by conjuring up some convenient, mystical authority through the pseudonym of 'inherent power.'" p. 250.

The Government, if it had chosen to do so, could have proceeded under the provisions of Title III. Indeed, as set forth earlier, the Government obtained a Title III order prior to the order at issue, involving the same crime and the same suspects and based on information supplied by the same informant. In other instances, the Government has obtained an order authorizing the use of the pen register pursuant to the provisions of Title III. *See*, e.g., *United States* v. *Finn*, 502 F.2d 938 (7th Cir. 1974); *United States* v. *Brick*, 502 F.2d 219 (8th Cir. 1974); *United States* v. *Falcone*, 505 F.2d 478 (3rd Cir. 1974), *cert. den.* 420 U.S. 955 (1975); *United States* v. *Lanza*, 341 F.Supp. 405 (M.D. Fla. 1972); *In Re Alperen*, 355 F.Supp. 372 (D. Mass. 1973).

The Government argues in footnote 23, pp. 22-23 that being able to avoid the requirements of Title III "significantly facilitates criminal investigations" and "the use of Title III procedures to obtain authorizations for the use of pen registers would substantially increase the administrative burden of law enforcement officers in a way detrimental to a fast breaking criminal investigation."

This may very well be true. But the whole purpose of Title III was to strike an appropriate balance between the need to protect the privacy of communications and the need for effective law enforcement. The very same arguments could be used to object to *any* application of Title III. But Congress has legislated otherwise, to a significant degree because of a long series of decisions by this Court concerned about the rights of individuals encroached upon by over-zealous authorities. The question, of course, is whether the widespread use of pen registers throughout the country (by state as well as federal officials), without complying with the requirements of Title III or comparable state statutes, can be squared with the statutory scheme and with individuals' constitutionally protected rights.

In considering whether authorizations for the use of pen registers outside Title III can be squared with the Congressional purpose in enacting that careful statutory balancing of interests, it is important that the court understands what is really involved as to the extent of the potential intrusion into privacy in the use of the telephone system. As the Fifth Circuit found in the case of *In Re Joyce, supra,* once a modern pen register has been installed, wiretap interception of telephone conversations may be accomplished simply by plugging in headphones or a tape recorder to the appropriate terminal on the pen register unit.

Pictures of an early version of a pen register and one of the versions now in common use, are included as Appendix A and B, respectively, of this brief. They show dramatically why the term "pen register" is a misnomer, and that authorization for the modern version would absolutely gut the statutory scheme.

Appendix A shows a primitive device capable only of recording dots, like a primitive Morse code machine. Appendix B shows an electronic decoder with numerous jacks. Once a connection of the leased telephone line is made, the

machine can print out a record of the number called, and, in addition, jacks are available for headsets to be plugged in and similarly for recording devices. Extensions could be run to still other premises.

As stated in our Reply to the Petition for Certiorari, we make no accusations. But we do submit that all the safeguards so carefully erected by Congress and the courts in the long history of dealing with this difficult subject, culminating in the Omnibus Crime Act of 1968, are incongruous, and can be readily circumvented, if the Government is to be permitted to get leased lines terminating in its private quarters without meeting the requirements of the Act.

If a district court may authorize the use of a pen register, with its inherent capacity for wiretapping, simply by satisfying a nebulous Fourth Amendment requirement, then, as the District Court for the Western District of Missouri stated, district courts would:

> ". . . have power and jurisdiction to authorize the use of pen register devices in connection with *any* investigation of *any* violation of the laws of the United States, regardless of the fact that the Congress may not have included the particular offense within the coverage of Title III." (*In the Matter of the Application of the United States of America for an Order Authorizing use of a Pen Register Device*, 407 F.Supp. 398 (1976) p. 403.)

If a federal district court has this authority outside of the statutory safeguards contained in Title III, so does any state or local court, whether or not the particular state has enacted the enabling state wiretap legislation contemplated by Title III.

Respondent respectfully submits that a review of the state of the law prior to the enactment of Title III, and Congress' stated intent in enacting Title III, lead to the

conclusion that Congress never intended to authorize the use of pen registers by law enforcement authorities, with their inherent capability of abuse, outside of the stringent statutory safeguards contained in Title III.

II

The court below was correct in holding that, absent express Congressional authorization, the district court erred in directing the Telephone Company to provide affirmative assistance.

A. Outside of Title III, there is no authority to order private parties to assist Government agents in electronic surveillance.

Regardless of whether a district court has authority to authorize law enforcement authorities to use "pen register" surveillance outside the scope of Title III, there is no authority to order Respondent, an unwilling private citizen, to assist Government agents, except pursuant to Title III. The court below, while stating that the district courts might have such power, held such orders should not issue without express Congressional authorization. The court stated that there must be concern not only with the Fourth Amendment rights of those whose telephone calls are monitored by pen register surveillance, but also with the rights of third parties, including communication common carriers, who might be called upon to aid the Government in its law enforcement endeavors.

The Government urges that the court below erred, and that district courts can properly exercise such authority under the All Writs Act (28 U.S.C. 1651(a)).[8]

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[8] The reliance on the All Writs Act is significant because the different courts ruling on the question have been uncertain as to just what they should rely upon, whether some "inherent" power or an analogy to the power given by Title III in the case of wiretaps, or even as the Government does here—which we shall respond to *infra*—a claimed peculiar status of a communication common carrier.

Both the majority and the dissent below recognized the unprecedented and far-reaching application of the All Writs Act which the Government would have this court adopt. Judge Medina, referring to the decision of the Seventh Circuit in *U.S.* v. *Illinois Bell Tel. Co., supra,* in which the Seventh Circuit held a district court has such authority under the All Writs Act, stated:

> "It appears that that was the first time a court construed the All Writs Act, or the notion of inherent judicial power, to provide justification for the entry of such an order in aid of its jurisdiction to order a search and seizure." (P. App. p. 12a)

Judge Mansfield in his dissent also recognized that the use of the All Writs Act under these circumstances is unprecedented:

> "It is true that, until the recent decision of the Seventh Circuit in *United States* v. *Illinois Bell Telephone Co., supra,* the authority granted by the All Writs Act was apparently never used to issue orders auxiliary to a search warrant." (id. p. 19a)

Judge Lay in his strong dissent in *United States* v. *Southwestern Bell Tel. Co., supra,* also noticed critically the precedential nature of the Government's position:

> "The majority's rationale is surely dangerous precedent. Judicial authority to compel a private party to assist the Government in the invidious act of electronic surveillance should be based on defined authority." p. 250

Except for *United States* v. *Illinois Bell Tel. Co., supra,* which is in fact a part of the current controversy which brings this matter to this Court, none of the cases cited by the Government for the proposition that a district court has authority under the All Writs Act to compel an unwilling third party to affirmatively assist law enforcement actually support the Government's position. Even the

Eighth Circuit in *United States* v. *Southwestern Bell Tel. Co., supra,* did not rely on the All Writs Act to find such power, rather it held the power was inherent.

The Government's inability to find judicial support for the interpretation of the All Writs Act it would have this Court adopt is not surprising. The courts which have ruled on the issue have consistently held that the All Writs Act is not an independent source of jurisdiction. The Seventh Circuit in interpreting the Act stated:

> "This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the court . . . The statute presupposes existing complete jurisdiction and does not contain a new grant of judicial power." *United States* v. *First Fed. S. & L. Ass'n,* 248 F.2d 804, 808-09 (7th Cir. 1957) cert. denied 355 U.S. 957 (1958).

See also *Brittingham* v. *United States Commissioner of Internal Revenue,* 451 F.2d 315 (5th Cir. 1971) where the court stated at page 317:

> "It is settled that this section, known as the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction previously acquired on some other independent ground."

The Government contends that it is not relying on the All Writs Act as an independent jurisdictional basis for the district court's order. It states that the jurisdictional basis is supplied by Rule 41 F.R.Cr.P., that the order to Respondent is necessary to effectuate the underlying order and, therefore, is authorized by the All Writs Act (fn. 29). The fallacy in the Government's argument, and the issue which it does not address, is what is the basis of the district court's jurisdiction over respondent, an unwilling third party not before the court, to require it to affirma-

tively assist in implementing the court's order. The All Writs Act provides that district courts shall have the power courts customarily have, i.e., "agreeable to the usages and principles of law" to carry out the responsibilities given them. It is not an independent source of jurisdiction, and by itself cannot provide the necessary jurisdiction over Respondent. The Government's contention that the All Writs Act by itself provides a district court such jurisdiction over a third party is unprecedented and the cases cited by the Government, far from supporting this assertion, merely serve to point up the unprecedented nature of the power the Government is asserting here.

In *Board of Commissioners of Knox County* v. *Aspinwall,* 24 How. 376 (1860); *Clark Equipment Co.* v. *Armstrong Equipment Co.,* 431 F.2d 54 (5th Cir. 1970); *Weber* v. *Lee County,* 6 Wall 210 (1867); and *Stern* v. *South Chester Tube Co.,* 490 U.S. 606, 20 L.Ed. 2d 177 (1968), the courts' orders were all directed to parties actually before the court, directing them to perform duties which they clearly were required to perform by applicable statute and where there existed a clearly defined right in the petitioner to have such duties performed.

In Board of Commissioners of Knox County, the Commissioners of a county had issued bonds and then neglected or refused to levy the necessary taxes. The Commissioners were the defendants, they were the ones at fault, and all the court did was order them to do their clear duty. No order to a third party not involved in the controversy was at issue.

Weber v. *Lee County,* involved the same type of fact situation—bonds not paid and a court-ordered levy. The court said that its order became the substitute for the ordinary process of execution to enforce the judgment.

In *Clark Equipment Company* v. *Armstrong Equipment Company,* the defendant had defaulted on a debt secured

by road building equipment which was scattered through five states. The security agreement obligated the debtor to assemble the equipment. The court held that it had the power to issue an order to the defendant debtor directing that the equipment be assembled. Again, the only use of the court's writ was against the defendant who had a clear obligation to the petitioner. The question involved was purely a technical one as to whether the federal court was limited to the relief an Alabama court could provide. It was held that it was not so limited, but could provide relief covering all five states in aid of its jurisdiction.

Stern v. *South Chester Tube Company,* is perhaps closest in point to the case at bar, but, even so, is radically different in its facts and clearly distinguishable. At issue was the question of whether a federal court should issue an order in the nature of mandamus if that was the only relief sought, as distinguished from being "in aid of" the securing of other relief as to which the court independently had jurisdiction. The Court held that previous distinctions between mandamus and mandatory injunctions were no longer meaningful, and that it had power to order the inspection of corporate records in a diversity case. It did so because there was a specific state statute authorizing such relief. No statute authorizes the relief sought by the Government here. The only statute providing a comparable right (Title III) was not used. If the Government had followed that statute, or, if a new statute is enacted creating the right, there would be no question raised as to the availability of the remedy.

As the Government concedes, outside of Title III there is no express statutory authority which provides that unwilling third parties, such as Respondent, may be directed to affirmatively assist law enforcement in effecting a pen register interception. The Government's position that the All Writs Act provides such authority, absent an independent statutory mandate, is not supported by the cases it cites.

The Government's position also is not supported by the cases cited by Judge Mansfield in his dissent below[9] (Pet. App. 18a-19a).

In *Adams* v. *U.S. ex rel. McCann*, the circuit court issued a writ of *habeas corpus* to perfect its jurisdiction over the appeal of an indigent *pro se* defendant who waived his right to a jury trial in the district court. The defendant was incarcerated at the time and the circuit court found this severely inhibited the appeal.

In *Hamilton* v. *Nakai*, the district court's order was directed to one of two Indian tribes who were parties before the court to determine the rights of the respective tribes in reservation land. The court's order was directed to the losing tribe to implement the court's decision. Similarly in *Mississippi Valley Barge Line Co.* v. *United States*, the losing party in a prior proceeding before the same court sought to frustrate the decision of the court by a deceptive transfer of the license at issue to another entity involving the same principals as the original defendant. Here again, the court's order was directed, in effect, to one of the parties already before it to enforce the court's decision.

In the *Georgetown* case, a hospital brought an action against respondent whose wife was critically ill and required blood transfusions. Respondent had refused to grant permission for the transfusions on religious grounds.

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[9] *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942); *Hamilton* v. *Nakai*, 453 F.2d 152, 157 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed. 2d 332 (1972); *Mississippi Valley Barge Line Co.* v. *United States*, 273 F.Supp. 1, 6 (E.D.Mo. 1967), *aff'd mem.*, 389 U.S. 579, 88 S.Ct. 692, 19 L.Ed.2d 779 (1968); *Board of Education* v. *York*, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 968, 28 L.Ed.2d 237 (1971); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *rehearing en banc denied*, 118 U.S.App.D.C. 90, 331 F.2d 1010, *cert. denied*, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *United States* v. *Field*, 193 F.2d 92, 95-96 (2d Cir.), *cert. denied*, 342 U.S. 894, 74 S.Ct. 202, 96 L.Ed. 670 (1951).

The court, in order to maintain the *status quo*, issued an order allowing such transfusions as might be necessary to save the wife's life until the ultimate issue between the hospital and respondent could be determined by the court. Here also, the court was preserving its jurisdiction by an order directed to one of the parties already before it.

In *United States* v. *Field*, the district court held in contempt bail fund trustees who refused to answer questions concerning the whereabouts of fugitives for whom the trustees had posted bail. The court of appeals upheld the district court basing its action on the unique relationship between one who posts bail and the criminal defendant for whom it is posted. The court held one who posts bail is responsible for the appearance of the defendant and has voluntarily entered into a contract with the court thus providing jurisdiction.

Thus, the cases set forth above stand for the obvious proposition that a court may issue to parties actually before it, or, as in the case of *Field*, to one who has voluntarily incurred a responsibility to the court, all necessary orders to preserve and implement the court's jurisdiction.

In *Board of Education* v. *York*, respondents insisted on sending their child to a particular school in violation of a Board of Education directive, issued pursuant to a court-ordered integration plan, that respondents' child should be sent to another school. After respondents had repeatedly violated the Board of Education's directive, the district court issued an injunction prohibiting respondents from sending their child to the first school and further provided that if the child was to continue in the school system, he should attend the school designated by the Board. The essential difference between this case and the case at bar is that respondents repeatedly flouted the directives of the Board of Education which had been issued pursuant to the court's order. Thus, respondents through their affirmative action were attempting to interfere with the implementation of the court's order. It is obvious that a district

court has the authority to issue an injunction against those who, rather than challenging the court's order through the judicial process, take affirmative steps in an attempt to frustrate the court's mandate. This clearly is not the case at bar.

Thus, neither the Government nor Judge Mansfield in his dissent below, have been able to cite any decisional authority to support the Government's position. This is significant for, despite the fact that the All Writs Act is one of our most ancient statutes, the Government has not been able to show that "agreeable to the usages and principles of law" a district court, without underlying statutory authority, has the power peremptorily to order a third party, not before the court, to aid in carrying out its orders.

It is not sufficient just to assume that if the court's order would be incapable of execution but for the assistance of a third person, such person can be ordered to assist. *Cf. Iowa City Montezuma Railroad Shippers Ass'n* v. *United States,* 338 F.Supp. 1383 (D.C. Iowa 1972). In the absence of applicable laws creating a duty, even parties before the court are not subject to peremptory orders such as the one at issue here. The order in this case is in the nature of a peremptory writ of mandamus. Such writs should not issue unless the court clearly has jurisdiction of the subject matter, jurisdiction over the person to whom the order is directed, and there is a clear duty owing on the part of that person. The Sixth Circuit in *United States* v. *Battisti,* 486 F.2d 961 (1973) set forth the standard established by this Court for this type of writ as follows:

> "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory. *United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414, 51 S.Ct. 502, 75 L.Ed. 1148; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540, 57 S.Ct. 855, 81 L.Ed. 1272, *Rayborn* v. *Jones,* 6 Cir., 1960 282 F.2d 410." p. 964

None of these elements is present in the case at bar.

The first case in which the Government sought the extraordinary type of affirmative asistance it seeks here without statutory authorization was in *Application of United States,* 427 F.2d 639 (9th Cir. 1970), and the court ruled against the Government in no uncertain terms. In that case, the Government had obtained a valid Title III wiretap order and sought to have the district court direct the Central Telephone Company of Nevada to provide affirmative assistance to the FBI in carrying out the wiretap.[10]

The Government contended there, as it does now, that the district court must have such authority or the FBI would be frustrated in its investigation and unable to effect the interception. The Ninth Circuit rejected this argument stating:

> "It may or may not be true that, in this particular case, it is an absolute impossibility for the Federal Bureau of Investigation to effectuate the desired interception for which approval was sought without the active assistance of the company. But it is common knowledge that there can be, and frequently has been, wiretapping of telephone lines without the assistance or even the knowledge of the telephone company.
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> • • •
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> "We are not convinced that the authority which the Government would have the court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy,

[10] This was prior to the enactment of the 1970 amendments to Title III (18 U.S.C. §§ 2511, 2518 & 2520) expressly authorizing a district court to require the assistance of third parties in carrying out a Title III wiretap order.

from the power law enforcement officers may have to assemble a *posse comitatus* to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory, or inherent, for entry of such an order. We think the district court correctly decided that it was without power to grant the relief requested." 427 F.2d at 643, 644.

Thus, the Ninth Circuit as well as the Second Circuit has held that if the Government must have the right to compel affirmative assistance from third parties, it should address its plea to Congress.[11] After the Ninth Circuit decision, the Government did apply to Congress for such express statutory authority and Congress promptly amended Title III to provide for such assistance as follows:

> "It shall not be unlawful *under this chapter* for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, *pursuant to this chapter* (18 U.S.C. §§ 2510-2520), is authorized to intercept a wire or oral communication." 18 U.S.C. 2511(2)(a)(ii) (Emphasis added).

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[11] The Government has not done so since the 1970 Amendments to Title III. It is Respondent's understanding that in response to requests from both the National Wiretap Commission and the Congress to recommend changes in Title 18, Ch. 119, the Department of Justice has not requested that the courts be statutorily empowered to direct telephone company assistance in pen register situations. For example, on July 27, 1975, before the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Mr. James Reynolds of the General Crimes Section of the Criminal Division, on behalf of the Department of Justice, submitted several suggestions for changes in Title III; however, the pen register question was not raised. (Commission Hearings, Volume II, pp. 1478-1509).

The Government, realizing that by the plain language of the amendment Congress authorized such assistance only in connection with an order issued pursuant to Title III, urges that this amendment simply reflects what Congress had previously intended in enacting Title III. Judge Lay commenting on this position in *U.S.* v. *Southwestern Bell Tel. Co., supra,* states:

> ". . . this reasoning is difficult to follow. It provides an innovative explanation, but certainly a strange and new principle in the area of statutory construction. I always thought it was a fundamental rule of statutory construction that Congress does not legislate needlessly." (p. 248)

Nor does the Government's reference to the legislative history of the amendments support its position that Congress was simply recognizing that courts implicitly had this power. In 115 Cong. Rec. 37192 (1969) (Senator McClellan) and 115 Cong. Rec. 37193 (1969) (Senator Tydings), the Senators stated that, in enacting Title III, Congress intended that telephone companies who voluntarily assisted law enforcement officials in Title III interceptions should be immune from liability. There is absolutely no reference to the power of a district court to order such assistance prior to the 1970 amendments, or that such amendments were being made solely to confirm an existing right.

The further fallacy in the Government's position is that even if Congress considered that such power to provide affirmative assistance was implicitly contained in Title III prior to the 1970 amendments, it certainly does not follow that Congress intended district courts to have this implicit authority where the underlying order authorizing the electronic interception is not issued pursuant to Title III.

B. No different rules apply to a telephone company than to other private citizens.

In an attempt to avoid the logical implications for third parties in general of its interpretation of the All Writs Act, the Government seeks to create a different status for Respondent as a telephone company. Before turning to the logical weaknesses in that contention, it should first be pointed out that the Congress drew no such distinction in enacting the 1970 amendments to Title III. Those amendments authorize orders to be issued to "a communication common carrier, landlord, custodian or other person."

The Government contends that Respondent, as a common carrier, cannot pick and choose whom it will serve, and that, therefore, the Government has a *right* to have leased line service and mandamus should lie. This argument begs the question. True, if the Government had a lawful right to the lines it sought, Respondent had no discretion to refuse it. But the issue is whether, in fact, the Government does have a lawful right to be provided a line to be connected to a line of a telephone customer without such customer's knowledge and consent. This is not a service covered by the company's tariffs. If it were, it would be available to all without discrimination, and surely the Government does not contend that such is the case. Respondent, pursuant to tariff, offers private line service between telephones of the same customer or between two or more customers where all the customers consent. Thus, the Government's argument that it is merely seeking to be a subscriber to a public service offering of Respondent is demonstrably erroneous. If, as Respondent believes, the order at issue is invalid, Respondent is not justified in providing a private line to be connected with another customer's service without that customer's consent.

There is no validity to the Government's argument on page 28 that "the Court of Appeals was bound to rule on the case before it, not on some hypothetical future case"

and that "it was required to decide only whether the district court could properly order the telephone company, not some other private individual, to provide assistance . . ." There is no basis for making a special category out of telephone companies by judicial fiat. They are private citizens with the same rights and responsibilities as other private citizens, except insofar as they have additional duties or responsibilities created by statute. Cf. *United States* v. *Goldstein*, 532 F.2d 1305 (9th Cir. 1976); *Matter of Leitner* v. *New York Telephone Co.*, 277 N.Y. 180 (1938).

The Government's assertion of power in a district court to require a private third person to assist in carrying out the court's orders without a statutory basis therefor is unprecedented. Once the course of directing orders to private third parties is embarked upon, there are no guidelines.

C. Even if a district court has the power to order private citizens to assist in carrying out their orders, given the potential consequences for citizens in general, the court below appropriately exercised its discretion to prohibit the entry of such orders in the absence of Congressional authorization.

While Respondent believes, in accordance with the foregoing, that the Government should fail both because (1) a district court has no authority to issue the underlying "pen register" order, and (2) even if it does, it has no power to order unwilling third persons to become actively involved in carrying out its order, there is a further, and ultimate, question reached by the court below: given the extremely sensitive nature of the matter and the implications for the rights of citizens generally, *should* orders of assistance be issued *even if* the power exists to do so, absent specific Congressional action. We submit that the majority below was correct in holding it was an abuse of discretion to do so.

Much of the discussion and the authorities heretofore cited are apposite here and will not be repeated. As stated, courts and legislatures have wrestled for several decades with the very difficult problems of balancing the rights of individuals with the needs of law enforcement insofar as electronic surveillance is concerned. Title III was enacted as a comprehensive carefully balanced scheme. The widespread use of "pen registers," and certainly the use of modern electronic decoders, were at the very least not specifically dealt with. Secondly, mandated provision of facilities and technical assistance by communications common carriers also was not dealt with. Congress, following the Ninth Circuit's opinion in *Application of the United States,* 427 F.2d 639 (1970) acted to authorize mandated assistance by private citizens, including carriers, but only within the context of Title III with its carefully balanced scheme. Since the Government reads pen register orders *out* of Title III, it should not be heard simultaneously to contend for orders against common carriers *as though* it were proceeding under Title III.

The most disturbing aspect of the Government's position is its claim that all the district courts—and since it only claims for them power "agreeable to the usages and principles of law" all state courts—can, without statutory specification, direct orders to private citizens to participate in law enforcement without the extent of such power being spelled out in clearly defined statutes.

A policy with respect to "pen registers" can be enacted if that is the judgment of the people's elected representatives. Assistance of communications common carriers can be mandated if that is deemed desirable. But the asserted power against all private persons is unlimited in scope. It is one thing for courts to act to prevent an obstruction of their orders; it is quite another to dragoon unwilling private parties into affirmative participation.

We, therefore, commend to the Court's judgment the position taken by the majority below. Even if the Court does not conclude (as we think it should) that there is a lack of power in the district courts to issue the orders complained of, it should hold that it is an abuse of discretion to do so in this most sensitive area, where Congress has legislated comprehensively, without specific additional action by the Congress.

Conclusion

For the reasons set forth above, the judgment of the court of appeals should be upheld insofar as it provides that the district court erred in directing Respondent, outside of the provisions of Title III, to provide affirmative assistance to law enforcement in placing a pen register. The judgment of the court of appeals should be reversed insofar as it provides that a district court has authority to authorize use of a pen register by law enforcement, outside of the provisions of Title III.

Respectfully submitted,

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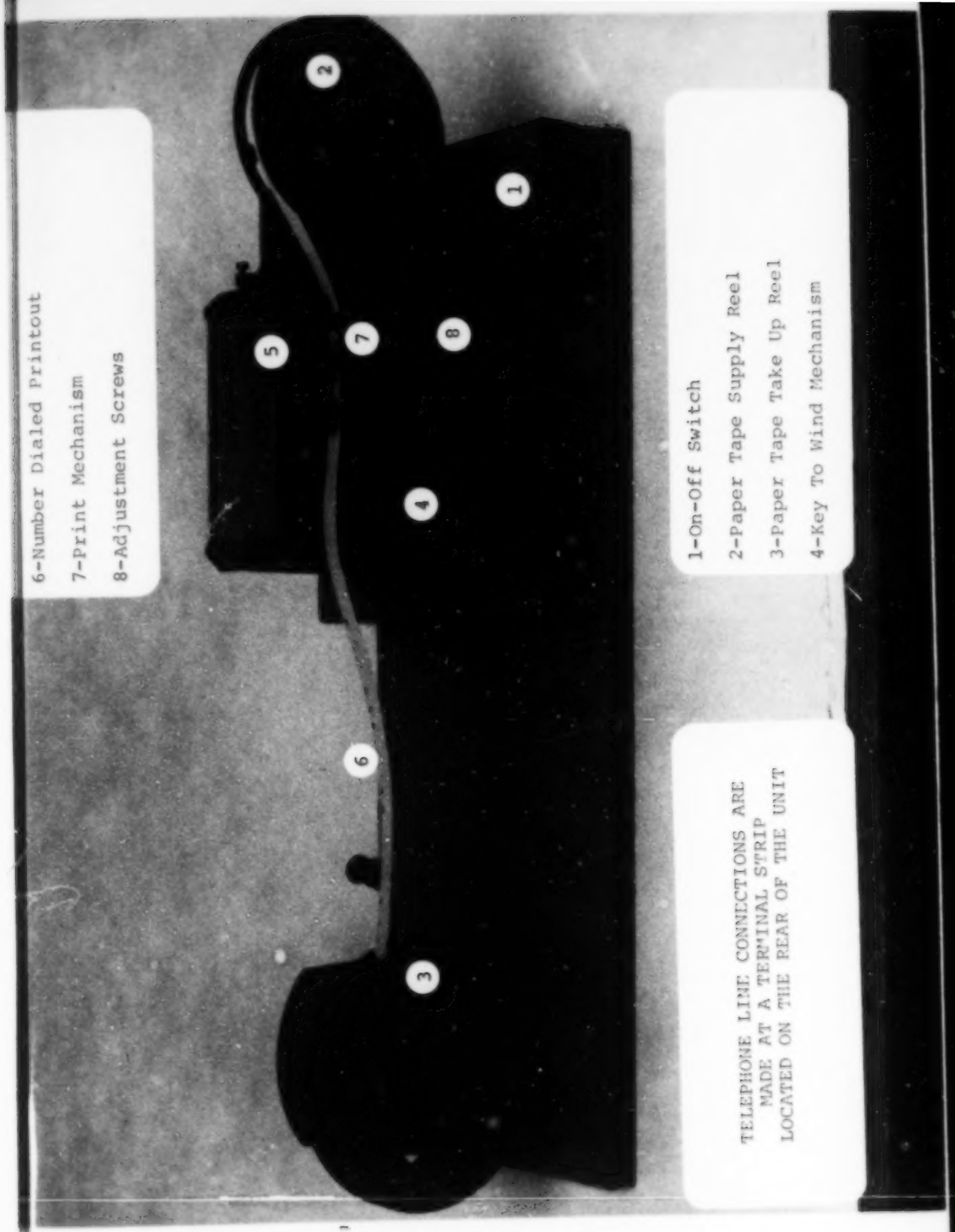
Appendix A, Photograph, Early Version of a Pen Register

(See opposite ☞)



Appendix B, Photograph, Modern Version of a Pen Register (Electronic Decoder)

(See opposite ☞)